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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HOWARD L. BEYER, Superintendent, and
W. CARY EDWARDS, Attorney General of New Jersey,

Petitioners,

v.

LAWRENCE L. SIMMONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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May 11, 1995

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

QUESTIONS PRESENTED FOR REVIEW

1. Whether *Griffith v. Kentucky*, 479 U.S. 314 (1987) compels retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986) to state *nunc pro tunc* appeals of a 1977 conviction resulting from prior federal collateral attack, involving a defendant who is a "chance beneficiary" of *Batson*, where without a delay in the appellate process and loss of the jury selection stenographic notes, there could not have been a claim under *Batson*?

2. Whether a federal court of appeals reviewing the denial of an application for habeas corpus relief is barred from review of a state court decision claim resting on state substantive and procedural law grounds under the "adequate and independent" state ground doctrine where an analogous federal constitutional claim exists?

3. Whether the burden of making a *prima facie* showing under *Batson v. Kentucky*, 476 U.S. 79 (1986) does not have to be borne by a defendant on federal collateral attack on a pre-*Batson* conviction, and may be presumed, where the stenographic notes of jury selection were lost prior to the raising of a *Batson* claim?

LIST OF PARTIES

All parties are parties to this petition.

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. _____

HOWARD L. BEYER, Superintendent, and
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LAWRENCE L. SIMMONS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Howard L. Beyer, Superintendent, New Jersey State Prison, and W. Cary Edwards, Attorney General of the State of New Jersey, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on January 4, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 44 *F.*3d 1160 (3d Cir. 1995), and is reprinted as Appendix A, p. 1a *infra.*

The order of the United States Court of Appeals for the Third Circuit with opinion dissenting from the order denying rehearing in banc, is reported at 44 *F.*3d 1176 (3d Cir. 1995), and is reprinted as Appendix B, p. 37a, *infra.*

The opinion of the United States District Court, District of New Jersey, is reported at 796 *F.Supp.* 777 (D.N.J. 1992), and is reprinted as Appendix E, p. 47a *infra.*

The opinion of the Superior Court of New Jersey, Appellate Division, has not been reported and is reprinted as Appendix H, p.92a, *infra.*

The opinion of the United States District Court, District of New Jersey, is reported at 689 *F.Supp.* 432 (D.N.J. 1988), and is reprinted as Appendix K, p.175a, *infra.*

JURISDICTION

On January 4, 1995, the United States Court of Appeals for the Third Circuit filed its opinion and entered its judgment reversing the district court's denial of a writ of habeas corpus. The jurisdiction of this Court to review

the judgment of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. sec. 1254(1).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, SEC.1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this case, a federal court of appeals, in ultimately reversing the district court's denial of this state prisoner's application for writ of habeas corpus relief from his 1977 murder conviction, determined that *Griffith v. Kentucky*, 479 *U.S.* 314 (1987) mandated retroactive application of *Batson v. Kentucky*, 476 *U.S.* 79 (1986) on this federal review of this "chance beneficiary's" state appeal *nunc pro tunc* resulting from prior federal collateral attack, and determined that habeas relief was required as respondent's *Batson* claim eludes review because the delay in his direct appeal resulted in the loss of the jury *voir dire* transcripts

and that his speedy appeal claim satisfied the prejudice requirement of *Batson* because the delay impaired appellate review of his *Batson* claim.

The undisputed facts developed at the state court trial, are thoroughly set forth in detailed account in the opinion of the Superior Court of New Jersey, Appellate Division (App.H, at pp. 109a-122a), and reiterated by the United States District Court for the District of New Jersey (App. E, at pp. 51a-65a), and can be briefly stated.

On May 27, 1977 at approximately 1:30 a.m. the respondent herein, Lawrence L. Simmons, together with Donald Phillips and David Wilson, left Phillips' apartment on East 23rd Street in Paterson, intent upon stealing a car to use in a holdup. Phillips was carrying a length of corrugated pipe, which would be used to break into the car if their master key did not suffice to unlock the vehicle. However, they abandoned this plan upon spotting Dr. David Doktor, who was descending the front stairs of his home on 14th Avenue near 27th Street in response to an emergency call at a nearby hospital. As Wilson watched, the respondent and then Phillips set upon the unsuspecting physician, whom they viciously struck down and dragged into the street. As their elderly victim vainly tried to defend himself, respondent and Phillips punched the physician over and over in his face and body. Phillips then grabbed a piece of plastic from his back pocket, wrapped it around his hands and rained repeated blows on the doctor's head with the corrugated pipe, shattering his victim's skull, while respondent unceasingly beat the aged physician and, as a final indignity, kicked his victim in the head.

Respondent then grabbed the doctor's back pants pocket and literally ripped it off, taking the doctor's wallet. The three men then fled, discarding the pipe, plastic and respondent's plaid jacket en route and leaving the unconscious physician, slowly bleeding to death, lying in the roadway.

Upon reaching the corner of 14th Avenue and 23rd Street, the three entered the School 13 playground and discovered that the doctor's wallet contained no money.

The trio subsequently spotted George Marshall, who was on his way home, coming through the playground. The three men walked up 23rd Street, passed Mr. Marshall, and then turned around. The respondent and Phillips followed Marshall across the street to the corner of 23rd Street and 14th Avenue, while Wilson stood on the schoolyard side of 23rd Street. Phillips approached Mr. Marshall, demanded money and when none was forthcoming, punched Marshall in the eye. Marshall grabbed Phillips and threw his assailant against the fence. At this point, the respondent came up behind Marshall and ripped his pocket off, taking Mr. Marshall's wallet and two dollars it contained. Mr. Marshall turned around and looked at respondent, who then beat up Marshall.

Respondent was charged on June 7, 1977 in Passaic County Indictment No. 737-77, along with Donald Phillips and David Wilson, with the murder of David Doktor, in violation of N.J.S.A. 2A:113-1 (Count One), murder while armed, in violation of N.J.S.A. 2A:151-5 (Count Two), and conspiracy to commit robbery, in violation of N.J.S.A.

2A:98-1 (Count Three). (1A 1-2; 1SA 1-2). On August 7, 1977, respondent and Donald Phillips were also charged in Passaic County Indictment No. 970-77 with the robbery of George Marshall, in violation of N.J.S.A. 2A:141-1 (1A3; 1SA 3).

Jury selection was conducted from October 11, 1977, to October 20, 1977 before the Honorable Bruno L. Leopizzi, J.S.C. After the competition of jury selection, due to the emergency hospitalization of Judge Leopizzi, the case was reassigned to the Honorable William J. Marchese, J.S.C. After an eleven day trial, from October 21 to November 8, 1977, the jury found respondent guilty on all counts of both Indictments. Respondent was sentenced on December 21, 1977 on both indictments to an aggregate term of life imprisonment plus 21 to 25 years. (1A4-8; 1SA 4-8).

No Notice of Appeal was filed on respondent's behalf within the 45 day time limitation. From March 13, 1978 to February 11, 1980, respondent engaged in correspondence with his trial counsel and the New Jersey Office of the Public Defender, Appellate Section, regarding the status of his appeal (1SA 9 to 18) and discovered that no appeal was ever filed. (1SA 19-27).

From March 24, 1980 through June 7, 1982, respondent engaged in petitioning the federal courts for a writ of habeas corpus, which was denied for failure to exhaust state remedies, and unsuccessfully appealing therefrom. (See, App. Q, R, S).

On July 12, 1982, respondent petitioned for post-conviction relief in the state trial court. (2SA 228-31). On July 7, 1983, the trial court denied State collateral relief for leave to appeal *nunc pro tunc*, which it was without jurisdiction to grant. (App. P.).

On August 1, 1983, designated counsel for the first time sought before the Appellate Division for leave to appeal *nunc pro tunc*. (3SA237-40). On or about August 17, 1983, the Office of the Public Defender, Appellate Section, filed a Notice of Appeal and transcript requests from the July 7th denial of post conviction relief on respondent's behalf (3SA 286-88; 3SA 232,236); by documents of September 15, 1983 that Office filed an amended Notice of Appeal from the underlying convictions on Indictment Nos. 737-77 and 970-77, without seeking leave to file an out-of-time appeal nor referring to the order denying post-conviction relief. By Order of September 27, 1983, the Appellate Division denied respondent's motion to file a notice of appeal *nunc pro tunc* and dismissed the appeal as untimely. (3SA 294). On October 25, 1983, the defense motion for reconsideration of the motion to file a notice of appeal *nunc pro tunc* was denied. (3SA 302).

By Order entered on November 9, 1984, the Supreme Court denied respondent's Petition for Certification and dismissed the appeal. (3SA 365).

A year and a half later, on May 9, 1986, respondent submitted a *pro se* motion with the Superior Court of New Jersey, Appellate Division, for leave to file a Notice of Appeal *nunc pro tunc*. (3SA 366-85). By Order entered on

August 13, 1986, the state appellate court denied respondent's application. (4SA 425).

Thereafter, on or about October 27, 1986, respondent filed another *pro se* Petition for Writ of Habeas Corpus with the federal district court. (4SA 426-37). By Order of July 5, 1988, the Honorable Dickinson R. Debevoise, U.S.D.J., for the reasons expressed in his decision of that date, *Simmons v. Beyer*, 689 *F.Supp.* 432 (D.N.J. 1988), issued a conditional writ of habeas corpus. (App. I). By Order entered on July 28, 1988, the Court amended its prior July 5th Order to permit reconstruction of the record. (4SA 516-18; 1A 104-06).

Although having been previously advised by the Supervisor of Official Court Reporters, Passaic County, that the Court Reporter notes of respondent's 1977 trial could not be found. (4SA 459), an independent search of the missing Court Reporters' notes was instituted on August 10, 1988 by the Passaic County Prosecutor's Office, which culminated in the discovery of the court reporters' notes for the following trial dates in the matter of *State v. Lawrence Simmons*, Passaic County Indictment Nos. 737-77 and 970-77; October 21, 24, 25, 27, 28, 31, and November 1, 2, 3, 4, 7, and 8, 1977. (4SA 567-71). Theses notes were transcribed on an expedited basis and thereafter served upon the parties and the courts. (4SA 572-78).

By Order entered on August 30, 1988, the Appellate Division granted the application for leave to appeal *nunc pro tunc* and for a limited remand to reconstruct the record,

primarily the jury selection record which was lost or destroyed. (1A 194; 5SA 602).

Reconstruction hearings were commenced on September 21, 1988 before the Honorable William J. Marchese, J.S.C. in the morning. (9A 2413-50), and the Honorable Bruno L. Leopizzi, J.S.C. in the afternoon. (9A 2430). Subsequently, two further reconstruction hearings were held before the Honorable Bruno L. Leopizzi, J.S.C. on September 29, 1988, (10A 2531-73; 5SA 605-73), and October 4, 1988. (10A2570-73).

Thereafter, the trial courts' Certified Statements and Exhibits in reference to the reconstruction of the record, along with court minutes, files, notes, documents and appendices marked into Evidence and all transcripts of the reconstruction hearings, were filed with the Superior Court of New Jersey, Appellate Division on October 4, 1988. (1A 9-17; 1A 107-83; 5SA 580-601; 5SA 605-98).

The reconstruction record discloses that selection in this case began on October 12, 1977 and concluded on October 20, 1977 before the Honorable Bruno L. Leopizzi, J.S.C. As the trial of the co-defendant Phillips ended two weeks previously and the victim was a Paterson physician popular in the community, there was concern by the Court and counsel as to any potential pretrial publicity problem. There were also concerns about any potential racial prejudice or bias held by potential jurors, as the victim was white and respondent is black, as well as whether potential jurors knew, or were patients of, the victim and whether potential jurors were familiar with the crime area.

Accordingly, an individual juror *voir dire* was conducted in chambers; after the trial court questioned each potential juror as per its three page, typewritten list of general questions and the handwritten nineteen questions submitted by defense counsel, counsel were given the opportunity to ask further questions of each potential juror. After this questioning, the potential juror was sent back into the courtroom while discussion ensued concerning any possible problems arising from the responses received and possible further areas of questioning.

At the beginning of jury selection, the prosecution had twelve peremptory challenges and the defense had twenty peremptory challenges. Near the end of jury selection one identified juror, Mark Keown, found to be satisfactory to counsel could no longer serve; the court excused this juror for cause and granted the prosecution one additional peremptory challenge and two additional challenges for the defense. All peremptory challenges were utilized by both parties.

The trial court's handwritten jury selection notes list the names of 124 men and women, from five different venire panels, who were individually *voir dired in camera* by the Court and counsel. In addition to the three identified male prospective jurors known to have been excused for cause, another unidentified 72 potential jurors ultimately were excused for cause after their individual questioning. The record does not reveal the identity of which 35 persons were peremptorily challenged, nor by which party, nor the race of any of the potential jurors who were peremptorily challenged or excused for causes.

The names, occupations and addresses of the fourteen jurors selected to hear the case are specified in the record; four of those jurors are male and ten jurors are female. Of the four male jurors, the record reveals that Juror #2 — who ultimately became the foreman of the deliberating jury after Juror #1, a male, and Juror #7, a female, were selected as alternates — was the only black male on the jury. The record does not reveal the racial composition of the ten female jurors, with the exception of Juror #6, who was white and one of the deliberating jurors.

The only reference in the entire record concerning the existence or basis of any mistrial motion regarding the prosecutor's use of peremptory challenges is contained in the 1977 file notes of Judge Marchese, who was not personally involved in the jury selection; paragraph six of these notes states: "Defense motion for mistrial charging State with systematically excluding blacks from jury. Leopizzi denied." However, the 1977 trial notes and files of Judge Leopizzi, who presided over the individual, *in camera* jury selection, does not contain any reference to any such defense motion during the 1977 trial. Neither the jury selection judge nor either counsel had any independent recollection of such a motion, nor did the notes or trial files of both counsel disclose the existence or basis of any such motion.

On October 5, 1988, respondent filed a motion in federal district court, challenging the sufficiency of the reconstructed record; on November 14, 1988, the Honorable Dickinson R. Debevoise, U.S.D.J. denied this motion without prejudice. (1A195-200).

On January 19, 1989, respondent moved before the Superior Court of New Jersey, Appellate Division for a limited remand to the trial court to move for a new trial on the ground of newly discovered evidence, based on the affidavits of David Wilson recanting his testimony at respondent's 1977 trial. (5SA713-63; 1A206-23), which was granted by Order entered February 14, 1989. Evidentiary hearings were held before the Honorable William J. Marchese, J.S.C. on April 3 and 4, 1989. (10A2574-2719; 10A2720-2970). In an oral decision on April 6, 1989, the state trial court denied respondent's motion for a new trial (10A2971-87), and an Order to this effect was entered on April 10, 1989. (1A204-05). Thereafter, respondent filed an Amended Notice of Appeal to include an appeal from this Order. (2A319).

On July 13, 1990, the Superior Court of New Jersey, Appellate Division, affirmed respondent's murder and related convictions. (App. H). Emphasizing that this state appeal was granted *nunc pro tunc*, the court rejected respondent's claim that the delay in furnishing transcripts violated his due process right to a speedy appeal, *(Id.* at p. 149a), and his claim that the loss or destruction of the stenographic notes of the jury *voir dire* deprived him of a meaningful appeal on the reconstructed jury selection record because it effectively precluded him from arguing whether the trial prosecutor used peremptory challenges to improperly exclude blacks from his 1977 jury. The State appellate court held that this latter argument, relying upon *State v. Gilmore*, 103 *N.J.* 508, 511 *A.*2d 1150 (1986), "must of necessity fail" as "attempting a retroactive application of *Gilmore* under the procedural history and circumstances of

this case. *Gilmore* and *State v. Watkins*, 114 *N.J.* 259 [553 *A.*2d 1344] (1989) foreclose this issue on this 'now for then' appeal." (*Id.* at p 138a). The court concluded that *Gilmore* specifically limited its retroactive effect, and further stated that as a threshold requirement the respondent must timely object to the prosecutor's use of peremptory challenges during or at the end of jury selection but before the jury is sworn. (*Id.* at p. 147a).

Moreover, the State appellate court, further finding that it had "entered an order on September 27, 1983 denying the motion to file the appeal *nunc pro tunc* and dismissing the appeal as untimely," explained that "[a]lthough the court did not state a reason for the denial in the order, we may presume it was dismissed because it was considered filed beyond a reasonable time" and determined that "[n]ot only was the motion long out of time under the [New Jersey court] rules, but it also came after a post-conviction relief application and [federal] *habeas corpus* proceedings." (*Id.*, at p. 100a).[1]

Thereafter, the Supreme Court of New Jersey denied respondent's petition for certification. (App. G), and respondent's petition for *certiorari* was denied by the Supreme Court of the United States on April 1, 1991. (App. F). Meanwhile, respondent moved to reopen his

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[1]Respondent also raised myriad other claims, including those contentions going to the issue of respondent's guilt, in the Appellate Division and in succeeding proceedings. The state courts rejected all these contentions, as did the federal district court and the court of appeals.

petition for *habeas corpus* relief before the federal district court, which was summarily granted by the Honorable Dickinson R. Debevoise, U.S.D.J. on November 14, 1990. (3A602-03).

By opinion and order filed on June 24, 1992, the Honorable Dickinson R. Debevoise, U.S.D.J., dismissed the petition without issuance of a certificate of probable cause. (App. E). The federal district court explained that application of the federalism principle expressed in *Wainwright v. Sykes*, 433 *U.S.* 72, 81 (1977) "excluded from consideration any questions of state substantive law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised... or are in themselves dispositive of [the] case." (*Id.*, at p. 76a). Accordingly, the district court determined that "[t]he [state] appellate court's conclusion regarding the [respondent's] *Gilmore* claim was clearly based upon that court's interpretation of state substantive law. Moreover, it was dispositive of the [respondent's] claim. Consequently, it is not reviewable in the [respondent's] federal habeas proceeding." (*Id.*, at pp. 76a-77a).

The district court also was "satisfied that the record furnished by the state was sufficient to give [respondent] an effective appeal to the appellate courts." (*Id.*, at p. 78a), and concluded that, "[a]s evidenced by the opinion of the [state] appellate court, [respondent] has been accorded a meaningful appeal in the state courts. Consequently, the due process violation alluded to in [the district court's 1988] earlier opinion has been cured." (*Id.*).

On appeal, the court of appeals reversed the district court. As a preliminary question the court, relying on *Griffith v. Kentucky*, 479 *U.S.* 314 (1987), concluded that *Batson v. Kentucky*, 476 *U.S.* 79 (1986) applied to this case. (App. A, at p. 6a). The Third Circuit determined that respondent's "1977 conviction did not become final until 1991"as respondent's "first appeal as of right was the critical missing step, and his intervening applications for collateral review did not render his conviction final." (*Id.*). The court acknowledged "[t]he irony... that the egregious delay in granting [respondent] a direct appeal inadvertently gave him the benefit of the *Batson* decision. Had [respondent] received a timely review, his conviction would have been final before 1986. In a sense, he is a 'chance beneficiary' of the *Batson* rule." (*Id.*).

The court of appeals also concluded, as a preliminary matter, that respondent's *Batson* claim was not barred under the "adequate and independent state ground" doctrine. (*Id.*, at pp. 9a-11a). The court determined that, pursuant to *Coleman v. Thompson*, 501 *U.S.* 722, 729 (1991), the state appellate court's decision as to respondent's *Gilmore* claim, although independent, was not adequate to support its judgment. (*Id.*).

The Third Circuit found, based upon the reconstructed record of the 1977 jury selection, that respondent's *Batson* claim was preserved for review. (*Id.*, at pp. 11a-12). The court determined that respondent's "*Batson* claim simply cannot be reviewed without a transcript of the voir dire.... We do not and cannot know whether [respondent's 1977] jury selection process was

infected by racial discrimination." (*Id.*, at p. 16a). Nevertheless, the majority determined that respondent established a *prima facie* showing of *Batson* violation from the reconstructed record. (*Id.*, at pp.13a-15a).

Acknowledging that "[a]lthough the Supreme Court has not explicitly recognized a criminal defendant's right to a speedy appeal," (*Id.*, at p. 18a), the court applied a modified, tripartite version of the speedy trial standard of *Barker v. Wingo*, 407 *U.S.* 514 (1972) in concluding that "the 13-year appellate delay violated [respondent's] right to due process and a speedy appeal." (*Id.*, at p. 21a). The court of appeals "concluded that [respondent] is entitled to [habeas] relief for both his potentially meritorious, but unreviewable, *Batson* claim and his speedy appeal claim," and considered "[t]he two violations... intertwined: [respondent's] *Batson* claim eludes review because the delay in his direct appeal resulted in the loss or destruction of the voir dire transcripts, and his speedy appeal claim satisfies the prejudice requirement because the delay impaired appellate review of his *Batson* claim." (*Id.*, at pp. 22a-23a).

Accordingly, the court of appeals reversed and remanded to the district court with instructions "to grant [respondent's] petition for a writ of habeas corpus, give the state an opportunity to retry [respondent], and specify the time period within which the state must retry or release him." (*Id.*, at p. 25a).

Concurring in the result, the the Honorable Dickinson R. Debevoise, U.S.D.J., noting that "[t]he precise retroactivity problem this case presents... has never been

directly before us or the Supreme Court," (*Id.*, at p. 26a), clearly recognized "that *Batson's* retroactive application to this collateral attack on [respondent's] pre-*Batson* conviction is essential to our mandate requiring New Jersey to grant [respondent] a new trial... or release him." (*Id.*, at p. 30a).

On February 10, 1995 the court of appeals denied the State's motion for rehearing and rehearing in banc by Order Sur Petition for Rehearing, together with a dissenting opinion filed by Circuit Judge Greenberg and joined by Circuit Judge Alito. (App. B). On March 14, pursuant to Federal Rule of Appellate Procedure 41(b), the Court of Appeals stayed issuance of the certified judgment in lieu of formal mandate until March 20, 1995 and on April 7, 1995 again stayed issuance of the mandate until May 12, 1995, with the stay to continue until final disposition by this Court if the petition is file on or by May 12, 1995. (App. C, D).

REASONS FOR GRANTING THE WRIT

A. THE THIRD CIRCUIT DECISION APPLYING *GRIFFITH V. KENTUCKY* AND THE RIGHT TO SPEEDY APPEAL TO STATE APPEALS *NUNC PRO TUNC* RESULTING FROM PRIOR FEDERAL COLLATERAL ATTACK EXTENDS THE RETROACTIVITIY RULE BEYOND THE LIMITS OF, AND CONFLICTS WITH, DECISIONS OF THIS COURT AND ANNOUNCES A NEW RULE CONTRARY TO *TEAGUE V. LANE*.

In an outcome one circuit judge deemed appalling, the court of appeals has manufactured a new rule of retroactivity involving state appeals granted *nunc pro tunc* on federal collateral review. Such a drastic reinterpretation of the retroactivity rule and the creation of a new rule regarding appellate delay on *habeas* review deserves this Court's attention.

It is well-settled that "[a] state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, ___ U.S. ___, 114 S. Ct. 948, 953, 127 L. Ed.2d 236 (1994); *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S. Ct. 708, 712 n.6, 93 L. Ed.2d 649

(1987); *Allen v. Hardy*, 478 U.S. at 258 n. 1, 106 S. Ct. 2880 n. 1.

The criminal judgment in this case was final on February 6, 1985 for purposes of retroactivity analysis, as respondent had exhausted his state appellate remedies and the time for filing the petition had expired. The presentation of the untimely motion for leave to appeal before the New Jersey Appellate Division and Supreme Court clearly satisfied the exhaustion requirement of 28 U.S.C. §§2253(b) and (c). See, *Bond v. Fulcomer*, 864 F.2d 306, 309-310 (3rd Cir. 1989); *Hull v. Freeman*, 932 F.2d 159, 164-165 (3d Cir. 1991) ("Hull I"); *Simmons v. Beyer*, 689 F. Supp. 432 (1988). Once the defendant's chance to appeal in state court had been waived or exhausted, the state is entitled to respect for the finality of its state judgment beyond the next in a series of endless post-conviction collateral attacks. This result that the conviction and sentence became final in February 1985 for retroactivity purposes reflects *Griffith's* underlying concern with treating similarly situated defendants similarly.

The Third Circuit sought justification of according this "chance beneficiary" relief by determining that respondent was not "similarly situated" with other defendants convicted in 1977 with convictions becoming final before *Batson* was decided because those defendants did not suffer a 13 year delay in appellate review. Aside from the factual miscalculation of the period of "delay," which was not attributable to the prosecution or New Jersey court system during the respondent's first applications in the federal courts, the Third Circuit's attribution of

appellate delay to the prejudice component of *Batson* defies logic: if there had been no "delay" there would be no *Batson* issue, as respondent's direct appeal would have been concluded prior to 1986. Indeed, absent a delay, respondent would not have been entitled to relief even if he could actually demonstrate a *Batson* violation.

Moreover, one must bear in mind that the event which kept Simmons' case alive after the denial of leave to file an untimely appeal in the state courts, a procedural default, was a conditional writ of habeas corpus in a federal collateral proceeding, and that the Appellate Division subsequently granted leave to appeal on a *nunc pro tunc* basis.

So, too, the Appellate Division "emphasize[d] that this [state] appeal was granted on a 'now for then' basis" and explained that

> A rule of retroactivity of later judicial opinions which would include cases such as this where a direct appeal was not taken for many years, with intervening applications which sought post-conviction and *habeas corpus* relief, might result in encouraging non-timely filing of direct appeals in cases where substantial terms of incarceration were imposed, so as to get the benefit of possible subsequent favorable rulings by future appellate courts. (App. H, p. 133a).

This is precisely the result of the Third Circuit's decision in this case, and gives Simmons federal rights denied to a similarly situated defendant. Indeed, in *Griffith* the Court determined that "the integrity of judicial review requires that we apply that [new] rule to all *similar* cases pending on direct review." *Griffith*, 479 U.S. at 323, 107 S. Ct. at 713 (emphasis added). Indeed, the Court noted that Griffith and Brown were tried in May and June of 1984 and Batson was tried in February 1984. *Id.* at 327 n. 13, 107 S. Ct. at 715 n. 13. So, too, the plurality opinion in *Teague v. Lane*, 489 U.S. 288, 300, 109 S. Ct. 1060, 1070, 103 L. Ed.2d 334 (1989) stated that "since a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are *similarly situated.*" (Emphasis added).

The Third Circuit's creation of a right to a speedy appeal in the context of this case results in treating the respondent more favorable than others convicted in 1977 and by relying in its calculus of prejudice — confusing prejudice generally with the prejudice component of *Batson* — a delay in the prosecution of the state *nunc pro tunc* appeal which could not possibly prejudice respondent under *Batson*.

Third Circuit's decision appears contrary to much of Justice Harlan's proposed approaches to the announcement and retroactive application of new constitutional rules on collateral review. Justice Harlan argued that, with two exceptions found not relevant in this case, new rules should not be applied retroactively to cases on collateral review, stating that "[t]he relevant frame of

reference... is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes from which the writ of habeas corpus is made available." *Mackey v. United States*, 401 U.S. 667, 682, 91 S. Ct. 1160, 1175, 28 L. Ed.2d 404 (1971) (concurring in judgments in part and dissenting in part). Addressing the purposes of habeas, Justice Harlan stated:

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Id. at 682-683, 91 S. Ct. at 1175. Indeed, in order to perform the deterrent function of collateral review, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Desist v. United States*, 394 U.S. 244, 262-263, 89 S. Ct. 1030, 1040-1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting).

Furthermore, the effect of the Third Circuit's decision is to create and announce a new rule in violation of *Teague*. The essential problem confronting the Court is that, *Griffith* itself did not directly address the problem of applying *Batson* to *nunc pro tunc* appeals. Even if we were to find persuasive the apparent determination that the decision in *Griffith* informs the analysis of this issue, it certainly does not follow that it compels the rule now announced by the Third Circuit. Indeed, *Griffith*, "do[es] not speak directly, if at all, to the issue presented here...". *Saffle v. Parks*, 494 U.S. 484, 490, 110 S. Ct. 1257, 1261, 108 L. Ed.2d 415 (1990). The application of *Griffith* to this case, on federal habeas review of a state appeal *nunc pro tunc* resulting from prior collateral attacks on this 1977 conviction after an initial state court denial of leave to file an untimely appeal, itself invokes a new rule of law and is in conflict with the decisions of this Court.

Application of *Griffith* to this case involving a 1977 trial and conviction creates the problem of not treating similarly situated defendants the same. This determination "hardly comports with the ideal of 'administration of justice with an even hand'" as respondent, "one chance beneficiary — the lucky individual whose case was chosen as the occasion for announcing the new principle — enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine." *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S. Ct. 2239, 2347, 53 L. Ed.2d 306 (1977) (Powell, J., concurring in judgment) (citation omitted). The Third Circuit's determination, and the confusion and inqeuitable results emanating from this decision, must be rectified by this Court.

B. THE THIRD CIRCUIT'S DECISION REJECTING THE STATE APPELLATE COURT'S DECISION UNDER STATE SUBSTANTIVE AND PROCEDURAL LAW CONFLICTS WITH THE DECISIONS OF THIS COURT.

"As to the role of adequate and independent State grounds, it is well-established principle of federalism that a State decision resting on an adequate foundation of State substantive law is immune from a review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81, 97 S.Ct. 2497, 2503, 53 L.Ed.2d 594 (1977); *Henry v. Mississippi*, 379 U.S. 433, 447, 85 S.Ct. 564, 567, 13 L.Ed.2d 408 (1965). See, *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). Applying this principle in the context of this federal *habeas* review thus "exclude[s] from consideration any questions of State substantive law, and thus effectively bar[s] federal habeas review where questions of that sort are either the only one raised by a petitioner or are in themselves dispositive of his case." *Wainwright v. Sykes*, 433 U.S. at 81, 97 S.Ct. at 2503-2504.

From the State appellate court opinion, (App. H,) it seems clear that that court made a factual determination that a timely objection to the prosecutor's use of peremptory challenges was not made in this case. A federal court must afford such written findings of fact by a state appellate court a presumption of correctness. 28 *U.S.C.* § 2254(d); *Summer v. Mata*, 449 U.S. 539, 546, 101 S.Ct. 764, 769, 66 L.Ed.2d 722 (1981); *Pemberthy v. Beyer*, 19 F.2d 857, 864 (3rd Cir.1994). Thus, contrary to the decision below

in this case, respondent's failure to timely object precludes consideration of his *Batson* claim in this federal *habeas* review.

"Notions of federalism and comity suggest that reasonable state procedural rules are entitled to respect in the federal courts." *United States ex. rel. Caruso v. Zelinsky*, 689 F.2d 435, 441 (3 Cir. 1982); *Wainwright v. Sykes*, 433 U.S. 72, 81, 89, 97 S.Ct. 2497, 2503, 2506, 53 L.Ed.2d 594 (1977). New Jersey procedure requires that a challenge first be raised before the jurors are sworn, or not at all; thus, respondent's failure to timely object amounts to an independent and adequate state procedural bar to consideration of this claim on federal *habeas* review. It is clear that an alternate holding of a state court, relying on a procedural bar, suffices to implicate the procedural default doctrine.

The Third Circuit decision rejected that the state appellate court's decision rested on an adequate state law ground, contrary to the principle that a federal *habeas* court should avoid constitutional questions when an alternative basis for decision fairly presents itself. As it cannot be fairly said that the jury selection process was infected by racial discrimination in this case, it seems particularly disrespectful to resolve any doubts against the propriety of this state court judgment.

Herein, it cannot be asserted that the state appellate court's lack of an express statement of "adequate and independent state grounds" justifies federal *habeas* review of this peremptory challenges claim. It is clear that the failure

to comply with the New Jersey substantive law and procedural rules was an adequate ground. Nor can it be asserted that the state appellate court's decision rested primarily on federal law or was interwoven with such law. There is no mention of federal law in the Appellate Division's opinion on this issue; hence, it "fairly appears" to rest primarily on state law. For those reasons, *certiorari* should be granted.

C. THE THIRD CIRCUIT'S DECISION THAT A *BATSON PRIMA FACIE* SHOWING DID NOT HAVE TO BE BORNE BY RESPONDENT, AND ITS FINDING OF A *PRIMA FACIE* SHOWING, RAISES IMPORTANT AND UNRESOLVED PROBLEMS.

The failure to make timely objection to the prosecution's exercise of peremptory challenges results in a waiver of a *Batson* claim. *Government of Virgin Islands v. Forte,* 806 F.2d 73, 75-76 (3d Cir. 1986). In this case, it is clear that the Appellate Division determined that a timely objection was not made during *voir dire.* "Thus, any inadequacy in this case with respect to a potential *Batson* claim is the direct result of defense counsel's failure to object and not the result of the non-recordation of the *voir dire* proceedings." *United States v. Cashwell,* 950 F.2d 699, 704 (11th Cir.1992).

Moreover, in this case it is clear that respondent's failure to order transcription of the *voir dire* in this case is not fairly borne by the State. The first documented request

for trial transcripts occurred in the request form of May 6, 1986; this request did *not* include transcripts of the jury *voir dire.* Under the New Jersey Rules for appellate practice, the contents of the transcript for a state appeal shall not include the *voir dire;* if a question is raised on appeal with respect to the *voir dire,* the defendant shall specifically order such in the request for transcript. In this case, it was not until the mid-summer of 1988, *after* all parties and the federal and state courts were advised that the court reporter's notes in this case were lost or destroyed, that respondent's sudden request for the jury selection record for appeal was raised.

The burden of protecting, producing and creating a record of relevant facts in support of a claim and *prima facie* case of purposeful discrimination belongs to the defendant who claims that the prosecution struck potential jurors because of their race. *Riddick v. Edmiston,* 894 F.2d 586, 592 n. 7 (3d Cir.1990); *United States v. Sangincto-Miranda,* 859 F.2d 1501, 1520 (6th Cir.1988); *United States v. Esparsen,* 930 F.2d 1461, 1466 (10th Cir.1991). See, *Hall v. Whitley,* 935 F.2d 164, 165 (9th Cir.1991) (failure to provide federal habeas court a transcript of state trial proceedings justifies dismissal where resolution of appeal requires examination of facts at trial); *United States v. O'Brian,* 898 F.2d 983, 985 (5th Cir.1990) (it is appellant's responsibility to order parts of the record which allegedly contain error and failure to do so prevents court from reviewing the claim).

Furthermore, the Third Circuit majority decision in this case erroneously concluded that defendant's burden of

proving a *prima facie Batson* case was established. However, under *Batson* respondent must point to more than the bare fact of the removal of a black venireperson. *Batson* quite clearly requires the defendant to present facts to the federal court which raise an inference that the blacks were struck *because of their race. Batson v. Kentucky,* 476 U.S. 79, 93, 96, 106 S.Ct. 1712, 1721, 1723, 90 L.Ed.2d 69 (1986). See, *United States v. Porter,* 831 F.2d 760, 767-768 (8th Cir. 1987) (defendant's bare reliance on prosecution's use of peremptory challenge to strike one of the two black jurors insufficient to raise inference of discrimination); *United States v. Vasquez-Lopez,* 22 F.3d 900, 902 (9th Cir. 1994) (mere fact of prosecution's peremptory challenge of sole black potential juror failed to establish *prima facie* case).

Batson clearly provides that a defendant must identify facts and circumstances that support the inference of discrimination — including a pattern of strikes or the prosecutor's statement during *voir dire* suggesting a discriminatory purpose. *Batson,* 476 U.S. at 96-97, 106 S.Ct. at 1722-1723. In this case, the record clearly reveals a concern on the part of the court and both trial counsel seeking to uncover and *eliminate* racial prejudice of potential jurors, who would be excused for cause. (Indeed, 75 of the 124 potential jurors were excused for cause.)

Moreover, when evaluating the "susceptibility" of this particular case to racial discrimination, *State v. Butler,* 731 *S.W.*2d 265, 269 (Mo.App.1987), as the majority decision apparently did, the "racial context" of this case provides absolutely no basis for advantage to the prosecution in using peremptory challenges in a

discriminatory manner. While Simmons is black and both his victims, David Doktor and George Marshall, were white, the prosecution's chief witness, David Wilson, is black, as are Mrs. Elsie Bagby and her daughter, Johnetta Bagby, while another witness is Hispanic, Mrs. Delia Garcia, and another is Pakistani. As one Circuit Court of Appeals has stated, "the key witnesses for both sides in this case were black, which would discount any advantage that a discriminating prosecution might perceive in striking blacks from the jury." *United States v. Matthews*, 803 F.2d 325, 332 (7th Cir.1986). The majority opinion was contrary to the principles in *Batson v. Kentucky*, and *certiorari* should be granted.

CONCLUSION

Based upon the foregoing reasons, this petition for *certiorari* should be granted. The determination of the Third Circuit Court of Appeals that *Griffith v. Kentucky*, 479 U.S. 314 (1987) compelled retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986) to this state appeal granted *nunc pro tunc* after prior federal collateral attack and grant of *federal habeas* relief due to the newly-minted constitutional deprivation of asserted delay in the prosecution of the state appeal as prejudicing respondent on the *Batson* issue, so far extended the retroactivity rule of this court and itself announced a new rule as to be contrary to the decisions of this Court. The court of appeals disregard for the state court decision based on state substantive and procedural law as being not "adequate" to support its judgment warrants review. Review is also warranted by this Court to clarify the *prima facie* burden

under *Batson* in cases where the jury *voir dire* is not transcribed.

Respectfully submitted,

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DATED: May 10, 1995

Supreme Court, U.S.
FILED
MAY 11 1995
OFFICE OF THE CLERK

No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HOWARD L. BEYER, Superintendent, and
W. CARY EDWARDS, Attorney General of New Jersey,

Petitioners,

v.

LAWRENCE L. SIMMONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Filed January 4, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-5370

LAWRENCE L. SIMMONS,
Appellant

V.

HOWARD L. BEYER; and THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, W. CARY EDWARDS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 86-04274)

Argued October 7, 1993
Before: HUTCHINSON, COWEN and NYGAARD,
Circuit Judges

(Opinion Filed January 4, 1995)

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OPINION OF THE COURT

NYGAARD, Circuit Judge.

We granted Lawrence L. Simmons' request for a certificate of probable cause and now must decide: (I)whether voir dire transcripts, missing after a 13-year delay between

Simmons' sentencing and direct appeal, are indispensable to review his claim that the prosecution improperly exercised its peremptory challenges to exclude African Americans from the jury, and (2) whether this delay violated Simmons' constitutional right to due process and a speedy appeal.[1] The district court denied Simmons' reopened petition for a writ of habeas corpus. We will reverse because, although the district court correctly concluded that Simmons' right to due process was violated, it erred by concluding that the violation was cured when Simmons received his direct appeal.

I.

In 1977, Simmons was sentenced to life imprisonment plus 21 to 25 years. Although immediately after sentencing he expressed his desire to appeal, and never waived his right to appeal, Simmons' conviction and sentence were not reviewed for 13 years. His appointed trial counsel did not file a notice of appeal or promptly transfer Simmons' case to the appellate division of the New Jersey Public Defender. Thereafter, despite requests from Simmons and his trial counsel, the Public Defender failed to promptly seek an appeal. Ultimately, the federal district

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[1]Simmons additionally asserts claims based on alleged violations of his *Miranda* and Fifth Amendment rights, inability to review the effect of pretrial publicity, governmental misconduct, verdicts against the weight of the evidence, errors In the jury instructions, other errors during trial, and the denial of his motions to examine the jurors and for a new trial. We have reviewed these claims and conclude that they are without merit.

court granted Simmons a conditional writ of habeas corpus, directing that a writ would issue unless the state gave him an appeal or a new trial. Thus, after he had pursued collateral review in the state and federal courts from 1980 to 1988, the New Jersey Superior Court, Appellate Division finally permitted Simmons to file a notice of appeal *nunc pro tunc*. After spending more than a decade in prison, Simmons was granted his first appeal as of right.

By this time, however, portions of the trial record including a lengthy in *camera* voir dire of prospective jurors were missing. The Appellate Division remanded the case for the limited purpose of reconstructing the record, and the judges who had presided over the jury selection and the remainder of the trial and sentencing held reconstruction hearings. Simmons challenged the sufficiency of the reconstructed record in federal district court, but his motion was denied without prejudice to his right to challenge the record in the state appellate proceedings. In 1990, the Appellate Division affirmed Simmons' conviction and sentence, and the New Jersey Supreme Court denied his petition for certification. In 1991, the United States Supreme Court denied Simmons' petition for a writ of certiorari. The district court then denied his reopened petition for a writ of habeas corpus, and he now appeals.

II.

Simmons contends that the manner in which the prosecutor exercised his peremptory challenges violated the federal and state law principles articulated in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), and *State v.*

Gilmore, 511 A.2d 1150 (N.J. 1986). In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment forbids the prosecution from exercising peremptory challenges to exclude potential petit jurors based on race or race-based assumptions. 476 U.S. at 89, 106 S.Ct. at 1719. Similarly, in *Gilmore*, the New Jersey Supreme Court held that its state constitution prohibits the prosecution's use of peremptory challenges "to remove potential petit jurors who are members of a cognizable group on the basis of their presumed group bias." 511 A.2d at 1154. Before analyzing the merits of Simmons' peremptory challenge claim, we must resolve two preliminary issues: (1) whether *Batson* and *Gilmore* apply to this case, and (2) whether Simmons' claim is barred under the "adequate and independent state ground" doctrine.[2]

A.

In *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878 (1986) (per curiam), the Court concluded that *Batson* does not apply retroactively on collateral review of a final conviction. *Id.* at 258, 106 S.Ct. at 2879. In *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987), however, the Court held that *Batson* does apply "to litigation pending on direct state or federal review or not yet final when *Batson* was decided." *Id.* at 316, 107 S.Ct. at 709. It reasoned that the integrity of judicial review requires consistent

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[2]The parties do not dispute and our review reveals that Simmons properly exhausted his peremptory challenge, and speedy appeal claim, in the state courts. *See Rose v. Lundy*, 455 U.S. 509, 518-20, 102 S.Ct. 1198, 1203-04 (1982).

application of "our best understanding of governing constitutional principles," *id.* at 323, 107 S.Ct. at 713 (quoting *Mackey v. United States*, 401 U.S. 667, 679, 91 S.Ct. 1160, 1173 (1971)), and fairness requires allegiance to "the principle of treating similarly situated defendants the same." *Id.*

Here, Simmons' 1977 conviction did not become final until 1991 when the United States Supreme Court denied his petition for a writ of certiorari. *See Allen*, 478 U.S. at 258 n.1, 106 S.Ct. at 2880 n.1 (citation omitted). Although this case was before the Supreme Court in 1982, in conjunction with Simmons' efforts to get a direct appeal, it did not then become final in the relevant sense. Simmons' first appeal as of right was the critical missing step, and his intervening applications for collateral review did not render his conviction final. *See Caspari v. Bohlen*, __ U.S. ___, ___, 114 S.Ct. 948, 953 (1994). Accordingly, the *Batson* decision, announced in 1986, applies to this case.

The irony is that the egregious delay in granting Simmons a direct appeal inadvertently gave him the benefit of the *Batson* decision. Had Simmons received a timely review, his conviction would have been final before 1986. In a sense, he is a "chance beneficiary" of the *Batson* rule. *See Griffith*, 479 U.S. at 323, 107 S.Ct. at 713. Simmons, however, was not similarly situated with other defendants convicted in 1977 whose convictions became final before *Batson* was decided. Those other defendants did not suffer a 13-year delay before getting appellate review, and we see no reason to bend the rule in *Griffith* to deny Simmons the constitutional protection afforded in *Batson*.

B.

The *Gilmore* court itself delineated its holding's rule of application:

> [T]he new rule will apply to this defendant, trials in which the jury selection commenced on or after the date of the Appellate Division opinion [which was affirmed in *Gilmore*], and cases now on appeal in which the issue was preserved in the trial court and the record is adequate to raise the issue.

511 A.2d at 1169. Applying these instructions, the Appellate Division rejected Simmons' contention that the reconstructed trial record was insufficient to permit it to review his *Gilmore* claim. It held that Simmons' argument "must of necessity fail because we consider this to be attempting a retroactive application of *Gilmore* under the procedural history and circumstances of this case."[3] The Appellate Division's opinion yields three potential justifications for this conclusion: (1) since Simmons' direct appeal followed his applications for collateral review, it was

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[3]The Appellate Division noted in passing that Simmons had filed no objections to the reconstructed record in the state trial court. Before the reconstruction hearings, however, the district court expressly granted Simmons permission to seek its ruling on the adequacy question. Simmons, in fact, challenged the sufficiency of the record in the district court, but his motion was denied "without prejudice to petitioner's right to raise these issues in the state appellate proceedings and in any future federal habeas corpus petition following exhaustion of state remedies." We will not presume a procedural default or waiver because Simmons apparently relied on the district court's assurances.

not legitimately "on appeal" for purposes of applying *Gilmore* retroactively, (2) the *Gilmore* issue was not sufficiently "preserved in the trial court," and (3) the reconstructed record was not "adequate to raise the issue," and the resulting prejudice was appropriately assigned to Simmons.

Although its specific rationale was not plainly stated, the Appellate Division clearly rendered a decision based on state law grounds which was later affirmed by the state supreme court. Simmons had also raised a *Batson* claim in his direct appeal, stating in his brief that "the rule of *Batson* is applicable to the case at bar," but the Appellate Division did not address the *Batson* issue. It relied solely on state law authority and based its decision to reject Simmons' peremptory challenge claim on *Gilmore*. "[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81, 97 S.Ct. 2497, 2503 (1977) (citations omitted), and we lack jurisdiction to overrule the Appellate Division's conclusion that *Gilmore* does not apply retroactively to Simmons' case. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184 (1935) ("where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment").

C.

Next, we consider whether the Appellate Division's dismissal of Simmons' *Gilmore* claim bars consideration of his *Batson* claim under the "adequate and independent state ground" doctrine. Although Simmons raised a *Batson* claim in his reopened petition for a writ of habeas corpus, the district court only analyzed the Appellate Division's dismissal under *Gilmore*. *Simmons v. Arvonio*, 796 F.Supp. 777, 790 (D.N.J. 1992). The district court concluded that this dismissal was not reviewable because it was based on substantive state law and disposed of Simmons' peremptory challenge claim. *Id.* (citing *Sykes*, 433 U.S. at 81, 97 S.Ct. at 2503). For the following reasons, we conclude that the district court erred.

In *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991), the Court reiterated that it "will not review a question of federal law decided by a state court if the decision of the court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Id.* at 729, 111 S.Ct. at 2553-54. Here, the Appellate Division's judgment on Simmons' state *Gilmore* claim was clearly "independent" of his federal *Batson* claim. The court cited no federal case law and did not refer to the Fourteenth Amendment or *Batson* decision in concluding that *Gilmore* did not apply retroactively to Simmons' case. Moreover, the *Gilmore* court explicitly based its decision "on the New Jersey Constitution, which protects fundamental rights independently of the United States

Constitution." 511 A.2d at 1157.[4] The Appellate Division's decision "on the New Jersey Constitution, which protects fundamental rights under *Gilmore*, however, was not "adequate" to support its judgment. The unavailability of a state constitutional claim is not dispositive as to the availability or merits of an analogous federal constitutional claim:

> [T]he federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of this federal claim without being bound by the determination on the merits of that claim reached in the state proceedings.

Sykes, 433 U.S. at 87, 97 S.Ct. at 2506-07.

If the Appellate Division had explicitly addressed and dismissed Simmons' *Batson* claim based on its analysis of federal law, then this claim would clearly be subjected to federal habeas review. For example, if it had dismissed both the *Gilmore* and *Batson* claims on state and federal retroactivity grounds, then its judgment regarding the retroactive application of *Batson* would be subject to review. Conversely, if the Appellate Division had ruled

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[4]Although the protections afforded under *Batson* and *Gilmore* are overlapping, the two cases rest on different foundations. *See Pemberthy v. Beyer*, 19 F.3d 857, 859 (3d Cir. 1994) (recognizing dual protection of New Jersey and federal constitutions); *State v. Bey*, 610 A.2d 814, 827 (N.J. 1992) (same).

that Simmons waived his *Batson* claim based on state procedural law, then its judgment would be immune from federal review. But, dismissing a state constitutional claim on state law grounds does not preclude federal habeas review of a parallel federal constitutional claim.

III.

A.

The first issue is whether Simmons' *Batson* claim is preserved for review. During the reconstruction hearings, Simmons' trail counsel testified as follows:

> Q: Do you recall making a motion for mistrial on the basis that the State was improperly excluding blacks on the basis of race?
>
> A: Again, I cannot say with certainty that I made such a motion. I don't have an independent recollection of it. I probably would have given the flavor and the context of this case, et cetera, that I would have made such a motion. Although, I cannot say that I — I can't say, categorically, that I did. I probably did, but I can't say that.

In response to a question about the timing of the motion, he stated that: "I don't have an independent recollection, but I would think that I definitely made it before the jury was sworn. I would not make it after the fact." Finally, counsel attested that: "At that time I was making the

motion, not in every case, but I recall making a motion for a systematic exclusion by the State in several other cases during that period of time."

The assistant prosecutor's testimony is not to the contrary. He testified as follows:

> Q. Do you recall the defense making a motion for a mistrial charging that the State systematically excluded back jurors?
>
> A: No. I believe that that happened, after reviewing notes that Judge Marchese made, but without having reviewed those notes, I would have no recollection of that occurring.

Although the notes of the judge who presided over the voir dire, Judge Leopizzi, do not refer to a defense motion based on systematic exclusion, the file of the judge who presided over the trial and sentencing, Judge Marchese, includes the following notation: "Defense motion for mistrial charging State with systematically excluding blacks from jury. Leopizzi denied." The court clerk's records indicate that defense counsel made several motions for a mistrial before the jury was sworn, although they do not specify the grounds for these motions. Based on this record, we are satisfied that Simmons' *Batson* claim was preserved for appeal.

B.

Having asserted a claim that the prosecution based its peremptory challenges on race, Simmons had the burden of establishing a prima facie case. A *Batson* analysis proceeds in three steps: (1) the defendant must make a prima facie showing of a violation, (2) if the defendant succeeds, the prosecution must articulate a race-neutral explanation, and (3) the trial court must then determine whether the defendant has proven purposeful discrimination. *See United States v. Uwaezhoke*, 995 F.2d 388, 392 (3d Cir.1993) (quoting *Hernandez v. New York*, 500 U.S. 352, 358-59, 111 S.Ct. 1859, 1865-66 (1991)), *cert. denied*, ___ U.S. ___, 114 S.Ct. 920 (1994). In *United States v. Clemons*, 843 F.2d 741 (3d Cir.), *cert. denied*, 488 U.S. 835, 109 S.Ct. 97 (1988), we elaborated on the first step of a *Batson* analysis, listing five factors that are relevant to a prima facie case: (1) the number of racial group members in the panel, (2) the nature of the crime, (3) the race of the defendant and the victim, (4) a pattern of strikes against racial group members, and (5) the prosecution's questions and statements during the voir dire. *Id.* at 748.

By the time of the reconstruction hearings, eleven years after Simmons' trial, defense counsel did not recall how many African Americans were in the venire, how many were struck by the prosecution, or how many were seated as jurors. The transcript from a pre-trial hearing held the day after the jury had been selected, however, records defense counsel's estimate that 130 potential jurors had been questioned. Additionally, trial transcripts disclose that, following an in-court identification of Simmons,

defense counsel stated: "Let the record reflect that he pointed to the defendant, Simmons. The only black male in the courtroom except for Mr. Jones, Juror number 2."

The assistant prosecutor similarly did not remember the total number of people in the venire, or its racial composition. He testified during the reconstruction hearings that "there could have been" as many as 20 African Americans, but that he did not think "there would have been" as many as 40. The assistant prosecutor recalled juror number two, the foreperson of the jury, as being an African American man, and he was "quite sure" that there were other African American venirepersons besides juror number two. He did not know how many peremptory challenges he used to strike African Americans from the jury. The court clerk's records reflect that both sides used all of their peremptory challenges: "Fourteen jurors in the box and all challenges have been exhausted."

Simmons is African American and thus a member of a cognizable racial group. Based on his motion for a mistrial "charging [the] State with systematically excluding blacks from [the] jury," we conclude that the prosecution struck at least one potential African American juror. *See Clemons*, 843 F.2d at 747 (striking single juror could constitute prima facie case). The fact that juror number two was African American is not dispositive. *See id.* ("mere presence of a single black on the jury would not necessarily prevent a finding of a prima facie case"). It appears that between 20 and 40 other African Americans may have been in the venire, although defense counsel and the assistant prosecutor were unable to recall with certainty.

The nature of the crime and its racial configuration — the murder and robbery of an elderly caucasian physician by a young African American man — contribute significantly to Simmons' prima facie case. *See Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) (considering substantive charge, "robbery of an elderly white man by a black man," in analyzing defendant's prima facie case). Presumably recognizing the potential that the trial would become racially charged, the judge specifically questioned "jurors about the fact that the victim in this case was white, [and] the defendant was black, [] attempting to ascertain whether jurors would have any difficulty with this." *See also id.* at 971 n.5 (noting that the trial court had asked the venire whether the respective race of the defendant and alleged victim would affect their judgment).

Although we cannot evaluate the last two *Clemons* factors because transcripts of the voir dire are not available, we conclude that Simmons has established a prima facie case of a *Batson* violation. The combination of Simmons' race, the prosecution's exclusion of at least one potential African American juror, and the circumstances surrounding the crime are sufficient to meet Simmons' prima facie burden. Thus, our focus shifts to the prosecution and its ability to come forward with race-neutral explanations for its peremptory challenges.

C.

In *Mayer v. City of Chicago*, 404 U.S. 189, 92 S.Ct. 410 (1971), the Supreme Court reiterated that "[i]n all cases the duty of the State is to provide the indigent as adequate

and effective an appellate review as that given appellants with funds." *Id.* at 193-94, 92 S.Ct. at 414 (quoting *Draper v. Washington*, 372 U.S. 487, 496, 83 S.Ct.774, 779 (1963)). "In terms of a trial record, this means that the State must afford the indigent a record of sufficient completeness to permit proper consideration of [his or her] claims." *Id.* at 194, 92 S.Ct. at 414 (internal quotations omitted). Although a full verbatim transcript is not automatically required, the *Mayer* Court concluded that an "appellant cannot be denied a 'record of sufficient completeness' to permit proper consideration of his claims." *Id.* at 198, 92 S.Ct. at 416; *see also Karabin v. Petsock*, 758 F.2d 966, 969 (3rd Cir.) (holding that defendant must show "colorable need" for compete transcript), *cert. denied*, 474 U.S. 857, 106 S.Ct. 163 (1985).

The problem here is self-evident. No one recalls how many potential African American jurors were peremptorily challenged, and the assistant prosecutor does not remember and has no notes indicating why he struck individual venirepersons. Both parties agree that further reconstruction hearings would be fruitless. Simmons' *Batson* claim simply cannot be reviewed without a transcript of the voir dire to allow the reviewing court to examine whom the assistant prosecutor excluded and why. We do not and cannot know whether Simmons' jury selection process was infected by racial discrimination.

Nevertheless, Simmons raised a colorable claim that the prosecution systematically excluded African Americans from the jury, and the prejudice stemming from our

inability to review this claim is not fairly borne by him.[5] The seriousness of this claim and its potential merit demand some form of habeas relief. As explained by the *Batson* Court, "[t]he core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." 476 U.S. at 97-98, 106 S.Ct. at 1723. It would be a grinding injustice to Simmons were he to suffer at the hand of a prosecutor who practiced racial discrimination through the use of peremptory challenges and then contributed to a delay that shielded his actions from review. The potential harm extends beyond Simmons and the excluded jurors: "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87, 106 S.Ct. at 1718.

IV.

Simmons contends that the 13-year delay also violated his right to due process and a speedy appeal, providing another basis for habeas relief. It is axiomatic that once an appeal as of right has been granted, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses

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[5]The district court opinion granting Simmons a conditional writ of habeas corpus details defense counsel's actions and non-actions with respect to obtaining trial transcripts and the state's failure to preserve the necessary materials for preparing transcripts. *See Simmons v. Beyer*, 689 F. Supp. 432, 448-49 (D.N.J. 1988).

of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 834 (1985). The constitutional touchstone is that the appellate procedure must furnish the components necessary for meaningful review. *See, e.g., Douglas v. California*, 372 U.S. 353, 358, 83 S.Ct. 814. 817 (1963) (right to counsel on direct appeal); *Griffin v. Illinois*, 351 U.S. 12, 19-20, 76 S.Ct. 585, 590-91 (1956) (right to transcript on direct appeal). Due process guarantees an appeal that is both "adequate and effective." *Evitts*, 469 U.S. at 392-94, 105 S.Ct. at 834-35. Since New Jersey provides for an appeal as of right, N.J. Const. Art. 6, § 5, ¶ 2, we must determine whether the 13-year delay constitutionally impaired the appellate review that Simmons eventually received.

Although the Supreme Court has not explicitly recognized a criminal defendant's right to a speedy appeal, in *Burkett v. Cunningham*, 826 F.2d 1208 (3rd Cir.1987) (*Burkett I*), we held that the Due Process Clause "guarantees a reasonably speedy appeal if the state has chosen to give defendants the right to [appeal]". *Id.* at 1221. Numerous other courts of appeals have also acknowledged a due process right to a speedy appeal.[6] In *Burkett I*, we applied

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[6]*See, e.g., Harris v. Champion*, 15 F.3d 1538, 1558 (10th Cir. 1994); *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993) (en banc). *cert. denied*, __ U.S. __, 114 S.Ct. 1230 (1994); *Cody v. Henderson*, 939 F.2d 715, 719 (2d Cir. 1991); *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir.), *cert. denied*, 469 U.S. 1033, 105 S.Ct. 505 (1984); *United States v. Pratt*, 645 F.2d 89, 91 (1st Cir.), *cert. denied*, 454 U.S. 881, 102 S.Ct. 369 (1981); *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392 (1981); *cf. Allen v. Duckworth*, 6 F.3d 458, 459 (7th Cir. 1993) (assuming excessive delay in appeal can violate due process), *cert. denied*, __ U.S. __, 114 S.Ct. 1106 (1994).

the criteria articulated in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972), to determine whether appellate delay had violated due process. 826 F.2d at 1222; *accord Harris*, 15 F.3d at 1559; *Tucker*, 8 F.3d at 676; *Johnson*, 732 F.2d at 381-82; *Rheuark*, 628 F.2d at 303. In *Barker*, the Supreme Court identified four factors to balance when examining an alleged speedy trial violation: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530, 92 S.Ct. at 2192. Although the interests at stake before trial and before appeal obviously differ, they are sufficiently similar to warrant the same general approach. *See Moore v. Arizona*, 414 U.S. 25, 27, 94 S.Ct. 188, 190 (1973) (*Barker* factors may carry "different weight where a defendant is incarcerated after conviction"); *Cody*, 936 F.2d at 719 ("*Barker* factors should not be applied uncritically" in speedy appeal context).

The 13-year delay in this case is an outrage, and that Simmons' appeal as of right "slipped through the cracks" is shameful. *See Burkett I*, 826 F.2d at 1225 (five and one-half year delay in sentencing and appeal warranted discharge); *cf. Harris*, 15 F.3d at 1560 (two-year appellate delay ordinarily gives rise to a presumption of inordinate delay). The subsequent period of litigation marking Simmons' efforts to obtain a direct appeal apparently took on a life of its own, without regard for fundamental notions of fairness and due process.

The district court's finding that the reason for the delay was ineffective assistance by appointed trial counsel and the Public Defender is clearly correct. *See Simmons*,

689 F. Supp. at 443-44. We recognize that "nominal representation on appeal violates due process because 'a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.'" *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990) (quoting *Evitts*, 469 U.S. at 396, 105 S.Ct. at 836). Responsibility for this delay cannot be charged against Simmons, the victim of ineffective lawyers. *See Harris*, 15 F.3d at 1562 (delay caused by Public Defender's inability to timely perfect an appeal should not be attributed to petitioner); *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990) ("failures of court-appointed counsel and delays by the court are attributable to the state"). In contrast to his lawyers' performance, Simmons himself timely requested and diligently sought appellate review. *See Simmons*, 689 F. Supp. at 435-36 (summarizing state court findings regarding Simmons' actions).

Simmons has been undeniably prejudiced by the 13-year delay. In *Burkett I*, we adopted a modified version of the three interests identified in *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193, as being relevant to prejudice in a speedy trial context. Accordingly, we assess prejudice in light of the following interests in promoting timely appeals:

> (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.

Burkett I, 826 F.2d at 1222 (quoting *Rheuark*, 628 F.2d at 303 n.8).

Here, the third factor is dispositive: Simmons' claim on appeal that the prosecution systematically excluded African Americans from the jury is no longer reviewable. This in not a case in which deprivation of a timely appeal has engendered "the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial might be impaired." *Id.* at 1225 (quoting *Rheuark*, 628 F.2d at 303 n.8). Simmons has suffered actual prejudice because his *Batson* claim is unreviewable on the reconstructed record. *Cf. United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994) (judicial bias claim unreviewable because of long-delayed and woefully inadequate trial transcript). Moreover, an impediment to a ground for appeal is the most serious form of prejudice "because the inability of a defendant adequately to prepare his [or her] cases skews the fairness of the entire system." *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193).

Each *Barker* factor indicates that the 13-year appellate delay violated Simmons' right to due process and a speedy appeal. We agree with the district court that due process was violated, but disagree that the violation was cured when the Appellate Division granted him the right to appeal. *See Simmons*, 796 F. Supp. at 791. If Simmons had received an adequate and effective, though excessively delayed appeal, then the issue of prejudice would become

more difficult.[7] However, the delay in this case "substantially affect[ed] the fairness of the appellate proceeding." *Cody*, 936 F.2d at 722, and we conclude that the due process violation caused by the delay compels some form of habeas relief.

V.

Having concluded that Simmons is entitled to relief for both his potentially meritorious, but unreviewable, *Batson* claim and his speedy appeal claim, we consider what relief is appropriate. The two violations are intertwined: Simmons' *Batson* claim eludes review because the delay in his direct appeal resulted in the loss or destruction of the

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[7]See Heiser v. Ryan, 15 F.3d 299, 303-04 (3d Cir. 1994) (11 1/2-year delay in hearing motion to withdraw guilty plea did not warrant habeas relief where petitioner's ability to show coercion was not impaired), *petition for cert. filed.* (U.S. June 2, 1994) (No. 93-9464); *Harris*, 15 F.3d at 1566 (once conviction affirmed, no entitlement to habeas relief "unless the petitioner can show actual prejudice to the appeal, itself, arising from the delay"); *Tucker*, 8 F.3d at 676 (despite three and one half year delay, once his conviction was affirmed, petitioner received all he was due from the legal process); *Allen*, 6 F.3d at 460 (despite a four and one half year delay, habeas corpus action became moot once petitioner's conviction was affirmed); *Muwwakkil v. Hoke*, 968 F.2d 284, 285 (2d Cir.) (13-day delay prior to direct appeal does not warrant habeas relief where conviction was ultimately affirmed because there was no actual prejudice). *cert. denied*, ___ U.S. ___, 113 S.Ct. 664 (1992); *Johnson*, 732 F.2d at 382-83 (once appeal was heard and found lacking in merit, there was no basis for ordering defendant's release). *But cf. Doggett v. United States*, ___ U.S. ___, ___, 112 S.Ct. 2686, 2693 (1992) ("Thus we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.").

voir dire transcripts, and his speedy appeal claim satisfies the prejudice requirement because the delay impaired appellate review of his *Batson* claim. In *Heiser v. Ryan*, 15 F.3d 299 (3d Cir.1994) *cert. denied, Heiser v. Stepenik*, 115 S.Ct. 313 (1994), we asserted that: "One of the most troublesome issues that faces a federal court sitting on a state prisoner's petition for habeas corpus is the appropriate remedy to fashion when the state proceedings have been characterized by excessive and indefensible delay." *Id.* at 300. Our task is "to fashion relief designed to rectify the prejudice of the violation." *Burkett v. Fulcomer*, 951 F.2d 1431, 1447 (3d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3055 (1992).

The usual remedy for a *Batson* violation is to grant a petition for habeas corpus, but allow the state an opportunity to retry the petitioner before a properly selected jury. *See Jones*, 987 F.2d at 975 (remanding for district court "to grant the writ without prejudice to the Commonwealth retrying the case"); *Harrison v. Ryan*, 909 F.2d 84, 88 (3d Cir.) (affirming order "granting the petitioner's writ of habeas corpus and requiring the Commonwealth to either retry the petitioner within 90 days or release him"), *cert. denied*, 498 U.S. 1003, 111 S.Ct. 568 (1990). Although Simmons has raised a hybrid Batson claim, which draws on equal protection and due process concepts and is based on our inability to review his *Batson* allegations, we believe that the same remedy should apply. For a speedy trial violation, the typical remedy seeks "to counteract any resulting prejudice demonstrated by a petitioner." *Burkett I*, 826 F.2d at 1222. Thus, we recognize that a "discharge is warranted where attempting

an alternate remedy would not vitiate the prejudice of the fundamental unfairness or would itself violate a petitioner's constitutional rights." *Id.* (citations omitted).

"[H]abeas courts ordinarily have fashioned a remedy designed to spur the state courts to fulfilling their constitutional obligations to the defendant." *Heiser*, 15 F.3d at 306 (citations omitted). Here, Simmons' right to a jury selection process that is untainted by racial discrimination is at the core of his Fourteenth Amendment right to equal protection. *Batson*, 476 U.S. at 97-98, 106 S.Ct. at 1723. Accordingly, the constitutional integrity of his current confinement is seriously in question. Given the monumental delay in this case and Simmons' constitutionally suspect incarceration, we have considered whether an unconditional release would be appropriate. Our difficulty lies in our inability to know whether the prosecution, in fact, systematically excluded African Americans from the jury. If it were possible to review Simmons' *Batson* claim, and it were found to be without merit, then the prejudice stemming from the delay alone would be a slender reed on which to support his unconditional release. *See Simmons*, 898 F.2d at 869 ("Release from custody is an extraordinary remedy, especially in a delay-of-appeal case where release would in effect nullify a state court conviction on grounds unrelated to the merits of the case."). We conclude that the relief best tailored to remedy the prejudice Simmons has suffered is a new trial and fair jury selection process.

VI.

Therefore, we will reverse the judgment of the district court and remand the cause for it to grant Simmons' petition for a writ of habeas corpus, give the state an opportunity to retry Simmons, and specify the time period within which the state must retry or release him.

HUTCHINSON, Circuit Judge, *Concurring*.

In this difficult case, I believe the Court correctly applies *Batson v. Kentucky*, 476 U.S. 79 (1986), to Simmons's pre-*Batson* conviction, even though Simmons raises it in a collateral attack on his state conviction. *Compare Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam) (courts should not retroactively apply new criminal procedure rule on collateral review of convictions becoming final before the new rule is announced) and *Teague v. Lane*, 489 U.S. 288 (1989) (same) *with Griffith v. Kentucky*, 479 U.S. 314 (1987) (courts should retroactively apply a new rule of criminal procedure to those cases pending on direct review or not yet final when the new rule is announced). I, therefore, concur in result.

I agree with the majority that this case is made more difficult because the reconstructed record is inadequate to review fully the *Batson* issue.[1] This particular difficulty

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[1]After concluding that *Batson* applies, the majority then recognizes a "self-evident" problem; i.e., it cannot decide the *Batson* issue because

implies that *Batson's* retroactive application to Simmons's case is important to the grant of the new trial remedy, which we all agree Simmons should be afforded. The precise retroactivity problem this case presents, however, has never been directly before us or the Supreme Court. I write separately because this important and unique retroactivity issue warrants an analysis.

Like the majority, I am reluctant to hold that the State's delay in hearing Simmons's appeal, in and of itself, establishes sufficient prejudice permitting us to conclude, as a matter of law, that his general due process right to a speedy appeal has been violated. *See* Opinion of Court typescript at 15-16. My decision, thus, rests not only upon the determination that this court should apply *Batson*, but also on two other critical factors; namely, the State's inordinate delay in granting Simmons's right of appeal and

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> [n]o one recalls how many potential African American jurors were peremptorily challenged, and the assistant prosecutor does not remember and has no notes indicating why he struck individual venirepersons. Both parties agree that further reconstruction hearings would be fruitless. Simmons' *Batson* claim simply cannot be reviewed without a transcript of the voir dire to allow the reviewing court to examine whom the assistant prosecutor excluded and why. We do not and cannot know whether Simmons' jury selection process was infected by racial discrimination.

See Majority Op. at 12. Simmons, indeed, concedes as much. *See* Brief for Appellant Brief at 26.

the partial loss of certain *voir dire* transcripts.[2] It is the concurrent existence of these three factors including the sad failure of New Jersey's otherwise generally efficient judicial system to provide Simmons with a reasonably prompt and adequate appeal of his 1977 murder conviction that allows us to grant the remedy of a new trial.

The first factor is the State's excessive delay, nearly fourteen years, in granting Simmons's right of appeal. As we held in *Burkett*, 826 F.2d at 1221, a state's delay in affording a convicted person a direct appeal, as of right, may violate his general Fourteenth Amendment right to due process, as opposed to the more specific Sixth Amendment speedy trial right available to state prisoners under the incorporation doctrine. *Id.* at 1219. In *Burkett*, we partially analogized the right to a speedy appeal with the right to a speedy trial, but modified speedy appeal analysis to emphasize the importance of a finding of prejudice. Instead of prejudice being merely a key factor or the "most important factor," *see Hakeem*, 990 F.2d at 760, we stated that "prejudice is generally a necessary ... element

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[2]At the very least, this rationale avoids any need to remand this case for further fact finding on the prejudice issue. *See Hakeem v. Beyer*, 990 F.2d 750, 771 (3d Cir. 1993) (remand for further fact finding on cause of delay relating to speedy trial issue); *Burkett v. Cunningham*, 826 F.2d 1208, 1227 (3d Cir. 1987) (remand on one of three convictions to make a determination concerning prejudice). Any further delay in this case is undesirable. Hence, like the majority, I favor simplifying the prejudice issue by avoiding reliance solely on the delay Simmons has suffered. *See* Majority Op. at 16 ("If Simmons had received an adequate and effective, though excessively delayed appeal, then the issue of prejudice would become more difficult.").

of a due process claim." *Burkett*, 826 F.2d at 1221 (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). In adapting the "prejudice" factor to the judgment of appellate delays, we then delineated three interests that are protected by prompt appeals:

> (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.

Id. at 1222.

Having made these observations, we nevertheless refused to hold that an on-going, combined delay of at least five years and three months in sentencing Burkett and processing his appeal established prejudice as a matter of law as to one of his three convictions. *Id.* at 1227. Instead, we remanded *Burkett's* case to the district court for fact finding as to prejudice and thereafter for balancing the degree of prejudice, in any, with the other *Barker* factors to determine whether Burkett's right to a speedy appeal had been violated. *Id.*; *see Barker v. Wingo*, 407 U.S. 514, 530 (1972) (enunciating four factors to consider in speedy trial analysis).

The second critical factor in this case concerns the loss of the transcript relating to the *voir dire* of Simmons's jurors before he received his direct appeal *nunc pro tunc* as

a result of his federal *habeas* petition. This partial loss of the transcript is material on prejudice only if *Batson* applies retroactively to Simmons's case.[3] The majority relies on the loss of this part of the trial transcript in holding that this case involves prejudice as a matter of law. I, too, believe this fact weighs heavily. It permits us easily to conclude that the reconstructed record is inadequate to afford Simmons an adequate and effective appeal. *See* Majority Op. at 12. Thus, the majority states: "we cannot evaluate the last two *Clemons* factors because transcripts of the voir dire are not available..." Majority Op. at 11; *see United States v. Clemons*, 843 F.2d 741 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988).[4]

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[3]It is the inability to review the *Batson* issue, not a violation of *Batson* itself, that is material to our finding of prejudice in this case. Simmons also argues that the loss of the *voir dire* and other transcript parts affected his ability to establish that his trial in the Patterson vicinage was constitutionally unfair entitling him to have his motions for a venue or venire change granted. I believe this argument lacks merit and, like the majority, am unable to discern any other issue Simmons has raised for which the reconstructed record is inadequate. *see* Majority Op. at 2 n. 1.

[4]Interestingly, the majority then concludes that the reconstructed record is sufficient to show a *prima facie Batson* claim. *See* Majority Op. at 11. In so concluding, I believe the majority goes beyond Simmons's argument. As I read his brief, he argues he cannot make a *prima facie* showing of a *Batson* violation on the reconstructed record. *See* Brief of Appellant at 26. Whether we analyze Simmons's case on the basis of this concession or, as the majority does, it is the deficiency in the reconstructed record with respect to the *voir dire* transcript that establishes irremediable prejudice to Simmons.

Thus, as noted, it is clear that *Batson's* retroactive application to this collateral attack on Simmons's pre-*Batson* conviction is essential to our mandate requiring New Jersey to grant Simmons a new trial within a reasonable time, to be determined by the district court, or release him. I turn now to an analysis of the retroactivity issue.

In *Griffith*, the text of the Supreme Court's holding states that *Batson* is to be applied to all cases "pending on direct review or not yet final" at the time *Batson* was decided. *Griffith*, 479 U.S. at 328. Additionally, the *Griffith* court stated that "final" "mean[s] a case in which a judgment of conviction has been rendered , *the availability of appeal exhausted*, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." Id. at 321 n.6 (emphasis added) (citations omitted). *Accord Allen*, 478 U.S. at 258 n.1 (citation omitted). Because of the inordinate delay Simmons's appeal that is attendant upon the circumstances of this case, he had not yet "exhausted" the "availability of appeal" when *Batson* was decided. In fact, his direct appeal , which took place after *Batson*, was not decided until nearly fourteen years after he was convicted, albeit only *nunc pro tunc*, as a result of the district court's earlier order in this *habeas* proceeding.

It can at least be argued, however, that literal application of *Griffith's* text to Simmons's case is in tension with one of the *Griffith* rationales. Simmons is not similarly situated to *Batson*, *Griffith*, or *Brown* (the petitioner whose case the Supreme Court consolidated with *Griffith*). Rather, Simmons, convicted in December 1977 of a brutal murder on strong but not overwhelming evidence,

is a "chance beneficiary" of counsel's failure to secure him the timely, direct appeal that the State of New Jersey grants as a matter of right to all persons convicted of a crime.[5] *See Griffith*, 479 U.S. at 327. *Griffith*, *Brown*, and *Batson* were tried in the same court within three months of each other. *Id.* The same prosecutor presented the State's case against all three and appears to have used peremptory challenges to deny them the right to be judged by an impartial jury, from which no person was excluded because of race. *Id.*

Simmons was tried almost ten years before *Batson* was even decided. Except for his counsels' inattention, his appeal would have been filed in January 1978, within 45 days of his conviction or, at least, no more than 30 days thereafter.[6] And, with the consequent likelihood that the

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[5]Once a state gives a convicted criminal defendant a right to appeal, the Fourteenth Amendment due process clause requires the State to provide an adequate means, including effective assistance of counsel, to process the appeal. See *Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

[6]New Jersey Rule 2:4-4(a) permits its appellate courts to extend the time for appeal by 30 days. *Compare* New Jersey R. 2:4-4(a) (1995) ("The appellate court, upon a showing of good cause and the absence of prejudice, may extend the time fixed by R. 2:4-1(a) (final judgment) ... for a period not exceeding 30 days, but only if the notice of appeal or notice of petition for certification was in fact served and filed within the time as extended.") *with Notice to Appellate Bar*, 100 N.J.L.J. 1208 (1977) ("The Supreme Court has directed the Appellate Division to relax Rule 2:4-4(a) in favor of allowing an out-of-time appeal nunc pro tunc on behalf of an indigent criminal defendant in any case where it satisfactorily appears that the defendant, personally, within time, requested his trial counsel or the Public Defender's Office to file an

appellate process would have been completed long before *Batson*, Simmons's conviction would have become unassailable.[7]

I do not believe it can fairly be said that Simmons, unlike *Griffith* or *Brown*, will suffer from any "actual inequity" if *Batson's* new rule is not retroactively applied to his 1977 conviction. *See Griffith*, 479 U.S. at 327-28. Whatever inequities may exist press upon other persons who were convicted by juries from which African Americans were shamefully excluded and then had those convictions affirmed in timely appeals before *Batson* was decided, or perhaps the people of New Jersey who may fail to understand how a person convicted of direct participation in the brutal murder of an elderly doctor, who ventured into the streets in the middle of the night to respond to an emergency, is afforded a new trial or released.

Indeed, at first glance it might appear that Simmons has been saved by the legal fiction of an appeal *nunc pro tunc* that is no less a fiction because it is stated in a dead,

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appeal on his behalf."). Unfortunately, the State did not appreciate the need to relax the strict time limits on appeal with respect to Simmons's case. If it had, this *habeas* proceeding might well have been avoided.

[7]I use the term "unassailable" because I agree with the Court that none of the issues Simmons has raised, except his hybrid due process-equal protection claim based on *Batson* and the State's inability to afford him adequate appellate review in a timely fashion, have merit. *See* Majority Op. at 2 n. 1.

ancient language.[8] Put simply, direct review was still available in Simmons's case when *Batson* was decided only as a result of a federal court's collateral review of his state court conviction which otherwise had every appearance of finality.

In addition, literal application of the *Griffith* holding to Simmons's case creates tension between *Griffith*, which espoused a bright line rule favoring retroactivity in all cases that are "pending on direct review or not yet final," and *Teague*, where the Supreme Court barred retroactive application of *Batson*, and other cases wherein a new constitutional principle of criminal procedure that clearly breaks with past precedent is announced, to cases on collateral review.[9] Here, but for the collateral attack, which Simmons successfully pursued in this federal *habeas* proceeding, his New Jersey conviction would have almost certainly been "final" before *Batson* was decided.

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[8]This particular fictitious form of time travel may merely reflect the vestigial survival of the common law rule that courts lack jurisdiction to hear an untimely appeal. It fails, however, to disguise the fact that Simmons's conviction had every appearance of finality long before *Batson*, but is now subject to review only by virtue of this collateral proceeding.

[9]The two exceptions espoused in *Teague*, which require the retroactive application of a new rule if it (1) "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1972) (Harlan, J., concurring), and (2) "implicate[s] the fundamental fairness of the trial" and factual innocence, *id.* at 312, do not apply here.

Griffith itself did not directly address the problem of applying *Batson* to *nunc pro tunc* appeals. As a result, it is arguably distinguishable on its facts from Simmons's case. Indeed *Griffith*, *Allen*, and *Teague* are all factually distinguishable from Simmons's case. Nevertheless, I think *Griffith* should be applied to this and all other cases involving appeals *nunc pro tunc*, not only because such a decision comports with a literal reading of *Griffith's* holding, but also because of *Griffith's* genesis in Justice Harlan's objections to the case specific approach to retroactivity adopted in *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Mackey v. United States*, 401 U.S. 667 (1971) (Harlan, J., concurring); *Desist v. United States*, 394 U.S. 244 (1969) (Harlan, J., dissenting).

The application of new rules to any case pending on direct review when the rule is announced, including appeals *nunc pro tunc* resulting from a collateral attack on a conviction, seems to me to represent a reasonable compromise between the unfairness incident to retroactive application of any procedural rule to trial proceedings concluded before the new rule is announced and the temptation of legislative free wheeling that courts confront when they are permitted prospectively to apply new departures in the law. Moreover, the application of new law to appeals *nunc pro tunc* does not seem to be inconsistent with the views of Justice Harlan or that of Justice Powell in his concurrence in *Griffith*, which states:

> It is to be hoped that the Court then will adopt the Harlan view of retroactivity in cases seeking relief on habeas petitions. Under that view, habeas

> petitions generally should be judged according to the constitutional standards existing at the time of conviction.

Griffith, 479 U.S. at 328 (Powell, J., concurring).[10]

It is perhaps unfortunate that retroactive application of *Batson* is required to grant Simmons any effective relief.[11] His only viable constitutional claim, which the Court describes as a hybrid equal protection-due process claim, results from a combination of the *Batson* problem, New Jersey's long delay in granting Simmons his right to appeal, and the consequent loss of part of the trial transcript material to *Batson*. Nevertheless, I am satisfied with the result reached by the Court. Accordingly, I concur with its decision to vacate the district court's order denying Simmons's petition for a writ of *habeas corpus* and remand with instructions conditionally to grant the writ,

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[10]In his reference to Justice Harlan's view on retroactivity, Justice Powell may be using the term "convicted" interchangeably with the term "final." *See Mackey*, 401 U.S. at 682-83 (Harlan, J. concurring); *see also Griffith*, 479 U.S. at 329 (Rehnquist, C.J., dissenting) (new constitutional rules governing criminal prosecutions should not apply in collateral proceedings challenging convictions that become final before the rule is announced).

[11]It is doubly unfortunate because neither Simmons himself nor the State had given us any analysis of the retroactivity problem and, by his reliance on *State v. Gilmore*, 511 A.2d 1150 (N.J. 1986) (New Jersey's *Batson* analogue, which plainly does not apply to Simmons's case, this court, the state appellate court, and the district court have all been left without the benefit of any real advocacy concerning retroactivity as it applies to appeals *nunc pro tunc*.

unless the State grants Simmons a new trial within a reasonable time, to be determined by the district court.

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Filed February 10, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-5370

LAWRENCE L. SIMMONS,
Appellant
v.
HOWARD L. BEYER; and THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, W. CARY EDWARDS

ON APPEAL FROM THE DISTRICT OF NEW JERSEY
(D. C. Civ. No. 86-4274)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges

who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Greenberg and Judge Alito would grant rehearing in banc. Judge Greenberg has filed an opinion dissenting from the order denying rehearing in banc, joined therein by Judge Alito.

By the Court,

/s/ Richard L. Nygaard

Circuit Judge

Dated: February 10, 1995

GREENBERG, *Circuit Judge*, dissenting from the order denying rehearing in banc.

I respectfully dissent from the order denying rehearing in banc. The panel opinion points out that "[h]ad Simmons received a timely review, his conviction would have become final before 1986," when *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), was decided. Slip op. at 5. This observation unquestionably is true as Simmons was sentenced in 1977. Thus, the panel acknowledges that Simmons is a "chance beneficiary" of *Batson*, for without the delay *Batson* could not have applied in this case. *Id.* The panel, however, justifies its result by pointing out that Simmons "was not similarly situated with other defendants convicted in 1977 whose convictions became final before *Batson* was decided [because] [t]hose other defendants did not suffer a 13-year delay before getting appellate review...". *Id.*

The difficulty with this reasoning is that the 13-year delay is unrelated to the *Batson* problem, for if there had been no delay there would be no issue under *Batson*. Accordingly, there is no justification for "equalizing" Simmons' situation with that of other defendants convicted in 1977 by giving Simmons a *Batson* claim. After all, if *Batson* is not applied, Simmons will receive the precise treatment which other defendants convicted in 1977 have received under *Batson*, *i.e.*, no relief. Here, the panel grants Simmons a remedy which bears no relationship to the problem caused by the delay. Instead of granting Simmons a remedy to compensate him for the wrongful delay in the

processing of his appeal, it grants him a sword by allowing him to profit from the delay.

In his concurrence, Judge Hutchinson appears to acknowledge the inequities of giving Simmons a *Batson* right, but concludes that "*Griffith* should be applied to this and all other cases involving appeals *nunc pro tunc*, not only because such a decision comports with a literal reading of *Griffith's* holding, but also because of *Griffith's* genesis in Justice Harlan's objections to the case specific approach to retroactivity adopted in *Linkletter v. Walker*, 381 U.S. 618 (1971)." Slip op. at 25. In the first place, however, the situation in this case is not at all clearly covered by *Griffith*, which really focused on defendants whose trials and appeals were taking place concurrently with Batson's. As Judge Hutchinson recognizes, "*Griffith, Brown* and *Batson* were tried in the same court within three months of each other." Slip op. at 23. Thus, without a retroactive application of *Batson*, Brown and Griffith would have been denied application of the new rule for truly fortuitous reasons. But *Griffith* simply did not address a situation in which the direct appeal was the product of a habeas proceeding conducted many years after the conviction. In fact, Simmons' situation falls somewhere between *Griffith* and *Allen v. Hardy*, 478 U.S. 255, 261, 106 S.Ct. 2878, 2881 (1986), which held that "the rule in *Batson* should not be available to petitioner[s] on federal habeas corpus review of his convictions." Thus, it simply cannot be said that a literal reading of *Griffith* compels application of *Batson*.

Moreover, the response to Judge Hutchinson's second rationale lies in the nature of *nunc pro tunc* relief

itself. *Nunc pro tunc* is a "phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e., with the same effect as if regularly done.*" Black's Law Dictionary, 6th ed. at. 1069 (1991) (emphasis added). Thus, even applying form over substance, the nature of the relief given should force the court to put Simmons in the same position he would have been in had the State not denied him his right to a timely direct appeal. So if we really are concerned with giving Simmons *nunc pro tunc* relief, it is axiomatic that, even abjuring case by case inquiries in deciding retroactivity questions, *Griffith* is inapplicable.

It seems obvious, then, that the greatest remedy that reasonably can be granted to Simmons by reason of the delay in the appellate process would be to consider this case with respect to *Batson* as if his final direct appeal had been decided at the outside time limit of when a properly prosecuted direct appeal from the 1977 conviction could have been decided. While I am not certain of that date, surely it was before 1986 and thus Simmons should receive no *Batson* relief.

The panel further indicates that "Simmons has been undeniably prejudiced by the 13-year delay ... because [his] claim on appeal that the prosecution systematically excluded African Americans from the jury is no longer reviewable." Slip op. at 15. Thus, the panel indicates that "Simmons has suffered actual prejudice because his *Batson* claim is unreviewable on the reconstructed record." *Id.* I respectfully submit that the foregoing reasoning defies logic, for if there had been no delay there would have been no

Batson issue because the direct appeals would have been concluded before *Batson* was decided. Consequently, without a delay in the appellate process, the state of the record with respect to the Batson claim could not possibly have mattered, as there could not have been a claim under *Batson*. Therefore, it is impossible to conclude that the delay in the appeal prejudiced Simmons on the *Batson* issue. The panel opinion confuses prejudice generally with prejudice *vis-a-vis Batson*. Indeed, the panel opinion reverses the actual effect of the delay because under its decision, rather than prejudicing Simmons, the delay has given him a winning issue. Thus, the delay in the appellate process prejudiced the state and not Simmons. Effectively, the panel opinion treats the *Batson* issue as if that case had been decided in 1976, not 1986, because it deals with *Batson* as if Simmons could have raised that case on a timely direct appeal.

The panel also explains "that Simmons is entitled to relief for both his potentially meritorious, but unreviewable, *Batson* claim and his speedy appeal claim." Slip op. at 16. It points out that the "two violations are intertwined: Simmons' *Batson* claim eludes review because the delay in his direct appeal resulted in the loss or destruction of the voir dire transcripts, and his speedy appeal claim satisfied the prejudice requirement because the delay impaired appellate review of his *Batson* claim." *Id.* In his concurring opinion, Judge Hutchinson emphasizes the connection between the claims as he points out that Simmons is receiving relief because of "a combination of the *Batson* problem, New Jersey's long delay in granting Simmons his right to appeal, and the consequent loss of

part of the trial transcript material to *Batson*." Slip op. at 26.

The net result of these related conclusions is as follows. Simmons is receiving relief in the face of the panels' acknowledgement that it does "not and cannot know whether Simmons' jury selection process was infected by racial discrimination." Slip op. at 12. Furthermore, he is receiving that relief even though its consequence is to treat him more favorably than other defendants convicted in 1977 and, absent a delay in his appeal, he would not have been entitled to relief even if he actually could demonstrate discrimination in the jury selection process. And to achieve this remarkable outcome, the panel relies in its calculus on a delay in the prosecution of Simmons' appeal that could not possibly have prejudiced him under *Batson*.

While I measure my words and write with great circumspection and restraint, plain integrity requires that I state that I am appalled at the outcome of this appeal. Judge Hutchinson indicates that "perhaps the people of New Jersey . . . may fail to understand how a person convicted of direct participation in the brutal murder of an elderly doctor, who ventured into the streets in the middle of the night to respond to an emergency, is afforded a new trial or [is] released." Slip op. at 24. I agree with that statement, as I do not understand it myself. I can add only that while the panel legitimately expresses concern about Simmons' constitutional rights and "the constitutional integrity of his confinement," slip op. at 17, it never suggests that there is any question of Simmons' guilt and

indeed it rejects all his contentions going to those issues. Slip op. at 2 n.1.[1] At bottom, the panel orders the release of a murderer sentenced to life imprisonment plus 21 to 25 years, subject only to the possibility that somehow the state can retry him 18 years after the murder.

I realize that it could be argued that notwithstanding the points I have made, this case simply does not merit *in banc* consideration because the facts here are unusual. Nevertheless, I dissent from the denial of rehearing *in banc* as I believe that at a minimum the people of New Jersey and the family of Dr. Doktor are entitled to have this case considered by the full court. Judge Alito joins in this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[1]The district court set forth the facts of the case in its opinion. *See Simmons v. Arvonio*, 796 F.Supp. 777, 781-86 (D. N.J. 1992).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 92-5370

Lawrence L. Simmons, Appellant

vs.

Howard L. Beyer

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until May 12, 1995.

/s/ Richard L. Nygaard
Circuit Judge

Dated: April 7, 1995

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 92-5370

Lawrence L. Simmons, Appellant

vs.

Howard L. Beyer; and The Attorney General of the State of New Jersey, W. Cary Edwards

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until **March 20, 1995.**

/s/ Richard L. Nygaard
Circuit Judge

Dated: **March 14, 1995**

APPENDIX E

FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 86-4274

LAWRENCE SIMMONS,
Petitioner,

vs.

PATRICK ARVONIO, Superintendent, East Jersey State Prison, ROBERT J. DEL TUFO, Attorney General of the State of New Jersey, OFFICE OF THE PASSAIC COUNTY PROSECUTOR and PATERSON POLICE DEPARTMENT,
Respondents.

ORIGINAL FILED
JUN 24 1992
WILLIAM T. WALSH, CLERK

OPINION

John Vincent Saykanic, Esq.
4 Brighton Road
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Ronald S. Fava,.Esq.
Passaic County Prosecutor
New Court House
77 Hamilton Street
Paterson, New Jersey 07505
Attorney for Respondents

DEBEVOISE, District Judge.

This is an action by petitioner, Lawrence Simmons pursuant to 28 U.S.C. § 2254 to obtain a writ of habeas corpus.

PROCEDURAL HISTORY

Petitioner was charged in a Passaic County Indictment, along with codefendant David Wilson[1] and Donald Phillips,[2] for the May 27, 1977 murder of

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[1]Wilson testified under a grant of immunity as the State's witness against the other defendants and in return the charge against him was subsequently dismissed.

[2]Codefendant Phillips was convicted on all counts in a jury trial shortly before Petitioner's trial. He was sentenced to an aggregate term of life plus 21 to 25 years. His convictions were affirmed in *State v. Phillips*, Docket Number A-2924-77 on May 2, 1980. Certification was denied on July 17, 1980, 85 N.J. 115 (1980).

Dr. David Doktor (*N.J.S.A.* 2A:113-1); murder while armed (*N.J.S.A.* 2A:151-5); and conspiracy to commit robbery (*N.J.S.A.* 2A:98-1).[3] Petitioner and codefendant Phillips were charged in a separate indictment with the robbery (*N.J.S.A.* 2A:141-1) of a second individual a short time later on May 27, 1977. Petitioner was tried separately and convicted on all charges after an 11 day jury trial in October and November 1977.

On December 21, 1977 petitioner was sentenced to life in prison on the murder conviction; a consecutive term of nine to ten years on the murder while armed conviction; a concurrent two to three year term on the conspiracy to rob conviction; and a consecutive sentence of 12 to 15 years on the conviction for the robbery of a second individual.

Shortly after petitioner was sentenced he began the long and often frustrating process of obtaining direct appellate review of his conviction. The details attendant to Petitioner's odyssey are thoroughly discussed in my earlier opinion, wherein I granted Petitioner a conditional writ of habeas corpus. *See Simmons v. Beyer*, 689 F.Supp. 432 (D.N.J.1988). Thus, I will not rehash those details in this opinion. Pursuant to the conditional writ, the state was directed to either grant the Petitioner an effective appeal to the appellate courts or grant the petitioner a new trial.

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[3]All of these offenses occurred prior to the adoption of Title 2C, the New Jersey Penal Code. Hence the provisions of Title 2A were applicable at the time of the indictment, trial and sentence.

On August 9, 1988 the Passaic County Prosecutor's Office filed, on behalf of Petitioner, an application for leave to appeal *nunc pro tunc* and for a remand to the trial court to reconstruct the record.[4] The motion was granted; reconstruction of the record was completed and the certified record was filed with the Appellate Division on October 4, 1988. On November 14, 1988 I denied Petitioner's motion challenging the sufficiency of the reconstructed record. *See Simmons v. Beyer*, Civ. No. 86-4274 (D.N.J. 14 November 1988).[5]

On January 8, 1989 petitioner moved for a limited remand to the trial court in order to seek a new trial on the ground of newly discovered evidence based upon affidavits of David Wilson who recanted his testimony from the 1977 trial. A supplemental certification was submitted on January 25, 1989. On February 9, 1989 the Appellate Division granted that motion and ordered that such remand proceedings be completed within 60 days. On March 9, 1989, a motion for a new trial was filed on petitioner's behalf with the trial court. Evidentiary

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[4]As noted in my earlier opinion, the state's decision to grant petitioner a direct appeal, rather than a new trial, placed the onus upon the state to reconstruct the missing portions of the transcripts from Petitioner's trial. *See Simmons v. Beyer*, 689 F.2d at 449.

[5]I concluded that petitioner must first challenge the adequacy of the reconstructed record before the Appellate Division of the Superior Court of New Jersey; "Once the state courts have had an opportunity to review petitioner's federal claims, they are subject to re-examination in a habeas corpus proceeding." *Simmons*, op. at 4.

hearings were held before Judge Marchese on April 3 and 4, 1989. In an April 6, 1989 oral decision, the judge denied petitioner's motion for a new trial. An order to that effect was entered on April 10, 1989. Thereafter, petitioner filed an amended notice of appeal to include the denial of that motion in his appeal.

Roughly thirteen years after the conclusion of his trial, Petitioner was finally accorded appellate review of his conviction. His conviction was affirmed by the Appellate Division on or about July 13, 1990. *See State v. Lawrence L. Simmons*, A-6277-87T1 (App.Div.1990). Petitioner then filed a petition for certification which was denied by the New Jersey Supreme Court on or about October 22, 1990. *See* Order; annexed as Exhibit Da 498 to Petitioner's Appendix.

Subsequent to the exhaustion of his state remedies, Petitioner moved to reopen his petition for habeas corpus before the federal district court. Petitioner's motion was granted on November 14, 1990.

STATEMENT OF FACTS

The following sequence of events, developed at trial, is meticulously set forth in the opinion of the New Jersey Appellate Division. *See State v. Simmons*, op. at 18-32.

Early in the morning on May 27, 1977 (approximately 1:30 a.m.), Dr. David Doktor, an elderly physician, received an emergency call requesting his attendance at Barnert Memorial Hospital. The call was

placed to his home on 14th Avenue in Paterson. Upon leaving his home, Dr. Doktor was brutally beaten and robbed. He died from the blows sustained in the attack. On that same morning, George Marshall was also beaten and mugged by two individuals.

During the early morning hours of May 27, 1977 (about 1:00 a.m.), David Wilson[6] returned to the home of Donald Phillips at 738 East 23rd Street, Paterson, where Wilson had been living for quite some time. Wilson testified that the petitioner and codefendant Phillips entered the apartment together. He further testified that they "were smoking refer and drinking beer." The beer was contained in quart bottles. Wilson had known Phillips at this time for approximately four months, but had not met the petitioner prior to that night.

The three men discussed stealing a car. Petitioner allegedly stated that "he wanted to do a stickup with the car." Phillips then asked Wilson, who was allegedly adept at stealing cars, if he had any keys to General Motors cars. Allegedly, petitioner produced a General Motors automobile key and, tossing it to Wilson, asked if it could be used to steal a car. Wilson replied that it might. Petitioner then told the others that he knew of a car they could steal on 14th Avenue near 26th Street in Paterson.

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[6]Wilson was the state's key witness in the case against petitioner. At trial Wilson's testimony implicated petitioner in the murder and the mugging. Wilson recanted his testimony in 1985, after he was sentenced to State Prison. He contended that he was coerced into lying at trial by the police and the prosecutor.

Wilson accompanied Phillips downstairs to the first floor hall closet where Phillips obtained a yard-long length of auto exhaust pipe with grooves in it. When Wilson asked Phillips what the pipe was for, Phillips said it was to break the window of the car if the key didn't work. Wilson, who would be acting as, the "lookout," would then "hot-wire" the car.

On the night of the murder petitioner was wearing black pants, a short sleeved light blue polo shirt and a plaid shirt-type jacket. He also had on a sleeveless yellow undershirt with brown trim, a pair of black socks and suede shoes. Phillips also had on black pants, and wore a long sleeved black shirt, white athletic socks with black and yellow stripes and a pair of white Pro-Ked sneakers with blue and red trim. Wilson was dressed in a blue and white striped sweater, a blue belt, peach pants, a brown stocking cap and tan checked hat with a small front brim. He also wore a brown bodysuit and black, heeled shoes.

At 5'2" Wilson was the shortest of the three, but appeared about 5'5" in his high heeled shoes. Phillips was six feet tall. Petitioner was about 5'6" tall and wore his hair in braids on the night he was arrested.

At about 1:30 a.m., the three individuals allegedly left the house, and walked down East 23rd Street to 14th Avenue where they headed easterly towards 26th Street and the car petitioner suggested they could steal. As they walked down 14th Avenue, Phillips carried the pipe and a quart bottle of beer. While Phillips stopped and waited for petitioner, who had lagged behind, Wilson continued

walking, and upon reaching 26th Street turned and saw the petitioner, now about a block behind, place the beer bottle in the middle of 14th Avenue about 10 to 15 feet from the sidewalk.

Wilson crossed the 26th Street intersection and, while intending to wait for the other two individuals to catch up with him, was frightened by the headlights of a car driven by Mrs. Garcia. Wilson hid in the bushes about 100 feet from the corner and watched Mrs. Garcia park on 14th Avenue near the corner of 27th Street and exit her vehicle. After parking her car, Mrs. Garcia started toward her house and then went back to the car where she had left her house key. After retrieving her key, she went into her house. Emerging from the shrubs, Wilson stood and watched Phillips and the petitioner cross 26th Street. Wilson then started walking up 14th Avenue. Eventually, Phillips and the petitioner caught up with Wilson at the intersection of 27th Street. As the two men approached him, walking side-by-side, Wilson saw that Phillips was still carrying the pipe.

Mrs. Garcia lived in the house on the corner of 26th Street and 14th Avenue. As she stood on her front porch, which faced 26th Street, and opened her front door, she saw a black man near the corner walking on 26th Street in front of her house as if he were "looking for something." She got a glimpse of the side of this man's face and observed that he had puffy cheeks and well, like braids or something on the head." She went inside and later peered out of her kitchen window, which overlooked 14th Avenue, and saw two black men dressed in dark clothing

walking on her side of 14th Avenue towards 27th Street. She testified "they were walking, had something in their hand, like a stick or something, between both men." After she lost sight of the individuals, Garcia went outside to the edge of her porch, fearful that someone was looking into her car, looked up 14th Avenue, saw movement in the distance and then went inside.

As the petitioner, Phillips and Wilson gathered at the intersection, about to make a right turn onto 27th Street, petitioner allegedly pointed to an old car, parked on 14th Avenue near the intersection and said, "there goes a car we can steal." The three men walked down 14th Avenue towards the car which was parked in front of a new vehicle. Wilson stopped near a driveway, about 20 feet from the newer car, as petitioner and Phillips stood behind the intended vehicle.

Meanwhile, during those early morning hours of May 27, 1977, Mrs. Purtell, a registered nurse who was affiliated with Barnert Hospital in Paterson, was on duty in the hospital's morgue. At 1:30 a.m., she telephoned Dr. David Doktor, to advise him of a medical emergency at the hospital. Dr. Doktor dressed and approximately 15 minutes later, left his residence on 14th Avenue.

From his lookout position, Wilson saw the elderly physician descend the front stairs of his house about 20 feet away. Phillips and the petitioner were hiding behind a car a few feet or so away from the doctor. Upon noticing Dr. Doktor, Phillips allegedly tapped the petitioner and said, "let's get him."

According to Wilson, as the doctor walked between the two parked cars, the petitioner "came up from behind and punched him in the face," knocking him to the ground. Phillips then grabbed the "old man" by the shoulders, dragged him into the roadway and started punching him in his face. According to Wilson, the petitioner "[w]as hitting him in his body and then the lower part of his body. The man then went down to the ground. Then he tried to get up, as he was getting up he was moving himself in front of the car. Mr. Simmons [petitioner] then came over and punched him in the stomach." Phillips then removed a piece of plastic from his back pocket, wrapped it around his hands, and retrieved the pipe from its hidden location near the rear tire of the old car that the three were attempting to steal. Phillips repeatedly struck the doctor in the head with the pipe.

By this time, Wilson had moved closer, and was now standing between the two parked cars about 5 feet from Phillips, the petitioner and their victim. He watched as Phillips continued to bludgeon the doctor's head with the pipe and stated "he hit him a number of times." As Phillips was hitting the doctor with the pipe, the petitioner was punching him "in the stomach and his back and his ribs and his side." Finally, petitioner kicked the doctor in the head. He then grabbed the physician's back pants pocket and ripped it off his pants, taking with it the doctor's wallet. The petitioner, Phillips and Wilson the fled, leaving the physician unconscious and lying in the roadway.

Phillips and Wilson fled across the street. The petitioner, however, ran up a driveway located on the same side of 14th Avenue. As the two men ran across the street, Phillips was unwinding the plastic from his hands. While he was fleeing, the plastic snagged on a fence across the street from the murder scene where the police found it.

The petitioner eventually caught up with Phillips and Wilson on the corner of 14th Avenue and 27th Street. Wilson first saw the petitioner as he rounded the corner of 28th Street and noticed that he was not wearing the plaid jacket he had on when the three men had left Phillips' residence. The three men then raced down the opposite side of 14th Avenue towards 23rd Street and the School 13 playground. Phillips, who still held the pipe as they ran, threw the pipe away as they fled down 14th Avenue. It was later recovered by the police.

Meanwhile, Mrs. Garcia, who had earlier driven to her 26th Street home, sat in her kitchen. A little later, after initially looking out her kitchen window and observing the two men walking up 14th Avenue, she again looked out her kitchen window, this time to see three men running down the opposite side of 14th Avenue towards 25th Street.

At 2:00 a.m., another witness left work and started her 8 to 10 minute trip home to Elmwood Park. As she drove east on 14th Avenue she observed, about one-third of the way into the block between 25th and 26th Streets, an empty beer bottle in her lane of traffic. In order to avoid hitting the bottle, she had to swerve and drive into the opposite lane. About a block and one-half further away,

her headlights picked up what appeared to be to be a bundle of rags, garbage, or "something laying in the road." As she drove closer, she saw that it was not rags, but a body lying on the south side of 14th Avenue.

Upon reaching the cornet of 14th Avenue and 23rd Street, the petitioner, Wilson and Phillips entered the School 13 playground. When the petitioner announced that the doctor's wallet contained no money, Phillips told him to "go hide the wallet." While Phillips and Wilson waited and watched, the petitioner ran to Phillips' house and returned "a few minutes later."

The trio then spotted George Marshall coming through the playground. Phillips said, "let's get a quarter off him;" the petitioner replied, "let's go." They walked up 23rd street, past Marshall, and then turned around. The petitioner and Phillips followed Marshall across the street to the corner of 23rd Street and 14th Avenue, while Wilson stood on the school yard side of 23rd Street. Phillips approached Marshall and asked for a quarter. When Marshall replied that he did not have one, Phillips told him "you're a liar: and punched him in the eye. Marshall grabbed Phillips and threw him against a nearby fence. At this point, the petitioner came up behind Marshall and ripped his pocket off, taking Marshall's wallet. As his attackers walked away down 23rd Street, Marshall called out, referring to the wallet, "I don't know where you're going because there is nothing in it." The petitioner then brought the wallet back to Marshall and beat him up once again. Afterwards, Marshall discovered that two dollars and some change were taken from him. Marshall later

described the petitioner as having a "sort of muscular build and looked like he was a little shorter than the other gentleman and he had like a white slipover tee shirt or some kind of shirt, slipover shirt on, short sleeved." In addition, Marshall stated that the petitioner had a "short hairdo, like it was braided."

Anthony Giordano was asleep in his home, located on the corner of East 23rd Street and 14th Avenue. Sometime after 2:00 a.m., Giordano was suddenly awakened by a strange noise. He went to the kitchen and looked out the window overlooking the corner. Since there was a street light on, Giordano was able to see what he thought to be three black males mugging a white male. One of the blacks was beating the white male as the other two were "just standing by." Giordano yelled out the window and told the men to leave the man alone. In reply, one of the attackers told Giordano to "shut up."

At the approximate time of the robbery, another Paterson resident, Mrs. Bagby, who lived on 23rd Street was awake in bed waiting for her daughter to come home. She testified that she was disturbed by "someone that was hollering, trying to get some help." She said what she heard sounded like a man yelling and it sounded like he was being mugged or attacked or something." She then went outside onto her front porch to see if her daughter, who she knew had just arrived in a car across the street, was all right. Still hearing the man yelling, she returned inside to telephone the police and report a mugging.

Meanwhile, her daughter was seated in a parked car on the right hand side of 23rd Street near 14th Avenue where she observed two black youths assault a white man while a third black youth watched. She stated, "I saw a Caucasian man coming down the street and three black youths passing him and then turning around, and two of the black youths grabbing him and held him and the other began to strike him and they were pulling at his pocket, at his back pocket." She began to flash the car lights on and off and honk the horn hoping that she would scare the attackers away. She described the young black men as ranging from 5'5" to 5'9' in height. She stated that one of the individuals had on a white short sleeved pullover shirt and corn rows in his hair. The second man wore dark clothing. She described the third person, the nonparticipant, as about 5'5" tall and wearing a wide or white striped sweater.

After Mrs. Bagby called the police she again went outside, down her front stairs and halfway into the street, calling out that she had notified the police. She repeatedly yelled out to determine if the victim was all right. A tall black man then came around the corner and told her that "the mf'er is alright." She described this individual as seeming "to be tall, about my complexion. His hair was sort or close-cropped, I don't know if it was braided or it was cut close, by that I meant it wasn't brushed in an afro." She watched for approximately two or three minutes as the three black men walked past the lighted intersection on 14th Avenue and 23rd Street and continued down 23rd Street toward School 13 and 15th Avenue.

Police patrol cars were quickly dispatched to the area. As a result of the incident, Wilson was apprehended near 15th Avenue and 22nd Street. Phillips, who was perspiring heavily and smelled of alcohol, was apprehended near Madison Avenue and Ellison Place. The petitioner was apprehended near the intersection of Ellison Place and Madison Avenue. Officer Micks noted that when he stopped the petitioner, he had a very rapid heartbeat and appeared to be nervous. The petitioner gave the officer his name and address and said that he was on his way home from visiting his sister, Wanda Addison. The petitioner said that he was uncertain of her address because she had recently moved.

The petitioner was brought into police headquarters at approximately 3:00 a.m. on May 27, 1977. He was escorted into a room and told to read aloud the Miranda rights listed on a plaque on the wall. The petitioner did so and then stated that he understood those rights. About one hour later Detective Rafferty and Hennison asked the petitioner: (i) if he knew Wilson and Phillips and (ii) what he was doing in the area where he was apprehended. The petitioner responded that he did not know either Wilson or Phillips and further replied that he had been visiting his sister before he was apprehended. He also told Detective Rafferty that he did not wish to say anything more. Later, the detectives returned with Phillips and Wilson, who both identified the petitioner in his presence. Again petitioner insisted that he did not know either of them. At about 10:00 a.m., the petitioner was advised that Wilson had given police a written statement implicating the petitioner in the murder. The petitioner then stated, "I figured he would

squeal, that rat bastard. I will kick his ass when I get him over at the jail." Later in the afternoon, as the petitioner, Phillips and Wilson were being transported for booking in an elevator, the petitioner told Wilson, according to Detective Rafferty's testimony, that he would "beat Wilson up when he gets him over the county jail." The petitioner testified and denied making any statements, except the one made in the elevator.

Mrs. Garcia later gave a description of the three young men she observed to Detective Torres, stating "that they were all black, young, between 16, 17 years old or maybe 18 years old wearing dark clothing. Also one was wearing a dark colored handkerchief of some kind around his head." At the police station, Garcia was also shown some photographs and indicated that one of them looked like one of the perpetrators, but that she was not sure. The next day as she read *The Paterson News*, she saw the three men depicted in the photograph as looking like one of the men she saw the night before. She saved the newspaper and turned it over to members of the Prosecutor's Office later that summer, pointing out the petitioner's photograph as being "similar" to one of the men she saw the night of the murder. In addition, she was shown an eight photograph array and identified the petitioner's photograph.

Mrs. Bagby also saw a copy of *The Paterson News* the following day, and recognized two of the men depicted in the newspaper photograph as similar to the attackers of Marshall. Bagby pointed out petitioner's photograph as being similar to or resembling the assailant who stated that

"the mf'er is all right." Bagby also described Phillips' photograph as resembling the taller and slim one." While she was also shown the eight photograph array, she was not able to pick out any photographs of the assailants. Her daughter, also shown the photograph array, selected the petitioner's photograph as "the person closely resembles one of the people I saw that night."

Giordano also saw the photographs in *The Paterson News* and recognized one of the men as one of the three assailants of Marshall. Giordano was also shown the photographic array and selected the photograph of the petitioner.

Marshall also saw the photographs on the front page of *The Paterson News* the following day and recognized those of the petitioner and Phillips as "two gentlemen that looked [like] the two guys that ripped me off." Marshall was also shown the eight photograph array and selected the two photographs. He chose the one of Phillips as it "resembles the guy that asked me for the quarter and hit me in the eye, the one I threw up against the fence." Marshall also selected the petitioner's photograph stating, "that's the one that took my pocket out and took my wallet."

Michele Yasso, a forensic chemist with the New Jersey State Police, qualified as an expert witness at trial and testified that she examined the clothing which the petitioner, Phillips and Wilson were wearing for blood stains. She said she found no traces of blood on them. Yacco also analyzed the clothing of Dr. Doktor and found

blood on the sport's jacket, the red slacks, the right and left shoes, the pink shirt, the undershirt, and the pair of boxer shorts. Yacco analyzed Doktor's blood type and found that it was blood type "O." She said she tested and analyzed five areas of bloodstains on the length of pipe and concluded they were of human origin and blood type "A."

However, Richard Coumbis, the chief state toxicologist testified that he examined the pipe, and that based on his tests, the blood found on the pipe was type "O." Coumbis testified that in his opinion Doktor's injuries, as depicted in certain State exhibits, specifically the ridges and depressions appearing on the victim's head, were consistent with the ridges and depressions on the pipe.

Coumbis knew before he analyzed the blood that the pipe had previously been examined by State Police Lab personnel who had identified the blood as type "A." He also knew that the victim's blood type was "O." Coumbis did not retest the areas of the pipe which had been tested previously.

The petitioner testified at trial that on May 26, 1977 he resided at 2 12th Avenue in Paterson with his mother, brother and sisters, and that he left home to go to the poolroom sometime that evening. He said he later returned and left the house again between 10:30 and 11:00 p.m. to go to the house of his sister, Wanda Addison who had been living for two or three weeks on the first floor of a house on East 23rd Street where Phillips' mother lived upstairs. The petitioner testified that he and Phillips did not get along and that he did not associate with Phillips.

The petitioner testified that he later answered a knock on the door and observed "two short dark-skinned men." The petitioner testified that he did not know either of the men, but later learned that one of them was David Wilson, whom he had seen previously a couple of times on the street. The petitioner said that he had also seen the other person on the street, but did not know him.

The petitioner maintained that Wilson was wearing a stockingcap on his head. The other individual was short, dark skinned, with "short cut hair." After opening the door, the petitioner returned to his sister's apartment and did not know where the two individuals went. Simmons said he later heard footsteps coming down the stairs and observed Phillips, wearing a long black shirt and black pants, and the two other individuals on the porch. The three then left the porch.

The petitioner said he had a can of beer with his sister, and left his sister's apartment at about 1:45 to 2:00 a.m. He then began walking down 23rd Street back to his mother's house. After crossing 15th Avenue, the petitioner observed Phillips and a white man and two other persons whom he did not recognize. The petitioner testified that Phillips and the white man were "tussling, arguing or fighting..." The petitioner asserted that he yelled, "hey" and started walking through the School 13 playground towards Ellison Place.

A. Exhaustion

Pursuant to 28 U.S.C. § 2254(b) & (c), state prisoners must exhaust all available state judicial remedies before a federal court will consider a petition for habeas corpus. *See Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). "[This] requirement... serves to minimize friction between our federal systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971). Because petitioner raised the same twelve objections in his appeal and petition for certification as he raises in his petition for habeas corpus, I am satisfied that he has exhausted all available state remedies. Accordingly, his contentions must be addressed on the merits.

B. Scope of Review

The writ of habeas corpus has a limited scope. Federal courts do not sit to retry state cases *de novo*, but rather, to review for violations of federal constitutional standards. *Milton v. Wainwright*, 407 U.S. 371, 377 (1977).

C. Petitioner's Claims

I. *Miranda Claim*

The petitioner argues that admission of the following statements violated his *Miranda*[7] rights, Fifth

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[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Amendment rights, and New Jersey State common law privilege against self-incrimination: (i) petitioner's statement that he did not know either Phillips or Wilson; (ii) petitioner's statement that he had been visiting his sister; (iii) petitioner's remark "I will kick [Wilson's] ass when I get him over in the jail;" and (iv) petitioner's statement that he would beat Wilson up when he got to the jail.

Miranda stands for the principle that no statements of an accused, made in a custodial setting, may be admitted unless the prosecution demonstrates that certain procedural safeguards were followed.[8] 384 U.S. at 444. These prophylactic measures are required only when the suspect is in custody and is subject to interrogation. *Id.*; *see also Rhode Island v. Innis*, 446 U.S. 291 (1980).

On October 28, 1977, during petitioner's trial, a *Miranda* hearing was held. The trial judge found that: (i) the petitioner's statements denying that he knew Phillips and Wilson were admissible; (ii) the petitioner's statement that he knew that Wilson would squeal was voluntary and made with full knowledge of his constitutional right to

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[8]These safeguards include informing the accused that (i) he has the right to remain silent; (ii) any statement he chooses to make can be used against him in a court of law; (iii) he has the right to have an attorney present at questioning; and (iv) he has the right to have an attorney appointed if he cannot afford one.

remain silent[9]; (iii) and that the remark made by the petitioner in the elevator was also voluntary and admissible. The petitioner's objection to the admissibility of his statement that he had been visiting his sister was overruled.

As noted above, petitioner was first questioned by Officer Micks after he was stopped at the intersection of Ellison Place and Madison Avenue. In response to Officer Micks' questions, the petitioner gave his name and address. He also indicated that he was coming from his sister Wanda Addison's house but he could not remember her address because she had recently moved to a new residence. Petitioner contends that these statements should not have been admitted at trial.

I need not reach the issue of whether *Miranda* warnings should have been issued prior to Officer Micks' questioning because I conclude that the admission of these statements did not prejudice the petitioner. Indeed, petitioner's testimony at trial corroborates the statements which he made to Officer Micks. Thus, I fail to see how the admission of the statements violated his *Miranda* rights.

The voluntariness of a statement is a legal issue requiring an independent legal determination by the federal court. *Miller v. Fenton*, 474 U.S. 104, 110 (1985); *Riddick v. Edminston*, 894 F.2d 586, 589 (3d Cir.1990). However,

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[9]The trial judge concluded that the detectives' statements to the petitioner regarding Wilson's confession was not tantamount to interrogation. Relying upon *Michigan v. Mosely*, 423 U.S. 96, 107 (1975) the trial judge concluded that petitioner's rights were not violated.

in a federal habeas action, a state trial judge's findings as to the subsidiary facts are presumptively correct under 28 U.S.C. § 2254(d). "[F]ederal courts... [in habeas] proceedings must not disturb the findings of state courts unless the federal habeas court articulates some basis for disarming the presumption that they are correct and may be overcome only by convincing evidence." *Smith v. Phillips*, 455 U.S. 209, 218 (1982) (citing *Sumner v. Mata*, 449 U.S. 539, 551 (1981)).

At the petitioner's trial, the judge found that the petitioner did not invoke his right to remain silent until after he had already stated that he had been at his sister's house and that he did not know either of the suspects. No colorable grounds have been advanced to reject the state court's finding.

Petitioner contends that the police were required to reissue *Miranda* warnings before presenting Wilson and Phillips for identification and before advising him that Wilson gave a statement implicating him in the murder. He maintains that his statement was obtained in violation of *Miranda* and should have been excluded from evidence. Furthermore, he contends that the remark he made about Wilson in the elevator was obtained in violation of *Miranda*.

In *Rhode Island v. Innis*, 446 U.S. 291 the Supreme Court addressed the meaning of the term "interrogation" under *Miranda*. The court concluded that the:

> *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

446 U.S. at 300-01. Generally, remarks made by the authorities concerning evidence which is unfavorable to the defendant is not characterized as interrogation. Such information is typically communicated "attendant to arrest and custody" in order to give the defendant an opportunity to make an informed intelligent waiver of a previously invoked right to remain silent. *See Jenkins v. Bara*, 663 F.Supp. 891, 895 (S.D.N.Y.1987) (no compulsion on the part of the police where they turned up volume of police radio broadcast concerning the discovery of evidence in the vicinity where the suspect was arrested); *United States v. Pheaster*, 544 F.2d 353 (9th Cir.1976) *cert. denied* 429 U.S. 1099 (1977) (confession made while defendant was being transported to jail after agents recited the evidence they had obtained against him including his fingerprints on a ransom note, held to be admissible despite the defendant's demand to see an attorney).

In the instant case, the appellate court concluded that the police did not subject the petitioner to

interrogation when they brought Wilson and Phillips into the room to identify him; "The police, as a normal incident to custody and arrest, had the right to have other witnesses, who, including those Simmons said he did not know, identify Simmons if they could." *Simmons*, op. at 40. Similarly, the court concluded that the police did not subject the petitioner to interrogation when they advised him that Wilson had given a statement which implicated the petitioner in the murder. *Id.* Thus, the court concluded that the petitioner's *Miranda* rights were not eviscerated.

I concur with the conclusion of the New Jersey Appellate Division that the conduct of the police did not rise to the level of interrogation. Although there may have been an element of compulsion present, it did not "reflect a measure of compulsion above and beyond that inherent in custody itself." *See Innis*, 446 U.S. at 300. Moreover, the unsolicited comment made by the petitioner in the elevator while being transported to another location was clearly a spontaneous utterance which was not the product of custodial interrogation. *See United States v. Vasquez*, 857 F.2d 857, 862 (1st Cir.1988). Thus, the admission of petitioner's statements was not violative of his constitutional rights.

Furthermore, I conclude that any statements made by the petitioner were the product of a knowing, voluntary waiver of his *Miranda* rights. In *Michigan v. Moseley*, 423 U.S. 96, 107 (1975) the Supreme Court stated that, pursuant to *Miranda*, interrogation must cease once the person in custody indicates his desire to remain silent. The Court

observed, however, that *Miranda* does not explicitly prohibit resumption of further questioning. Consequently, the Court concluded that "[T]he admissibility of statements obtained after the person in custody had decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was scrupulously honored." *Id.* at 104.

To determine the voluntariness of a confession, the court must consider the effect that the totality of circumstances has upon the will of the defendant. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973). The question in each case is whether the defendant's will was overborne when he confessed. *See Miller v. Fenton*, 796 F.2d 598 (3d Cir.1986) (citing *Schneckloth*, 412 U.S. at 225-26).

It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. *See Miller v. Fenton*, 796 F.2d at 650 (citing *Haynes v. Washington*, 373 U.S. 503, 514-15 (1963)). For example, the interrogator may play on the suspect's sympathies or explain that honesty might be the best policy for the criminal who hopes for leniency from the state. *See Miller v. Fenton*, 796 F.2d at 605 (citing *Rachlin v. United States*, 723 F.2d 1373, 1378 (3d Cir. 1983)) These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary. Thus, the question in this case is whether the petitioner was coerced or deprived of his ability to make an unconstrained decision to waive his *Miranda* rights.

I conclude that statements made by the defendant when he was; (i) confronted by Wilson and Phillips, (ii) confronted with Wilson's confession; and (iii) placed in an elevator with Wilson were not the product of compulsion or coercion on the part of the authorities. Petitioner's statements were made voluntarily and as such they were properly admitted into evidence at trial. *See United States v. Hodge*, 487 F.2d 945 (5th Cir.1973) (a voluntary waiver of Miranda took place where defendant made incriminating statements following an explanation by law enforcement officials of the charges and the evidence against him, after he had invoked his right to counsel); *United States v. Davis*, 527 F.2d 1110 (9th Cir.1975) (defendant's confession, obtained almost immediately after he indicated his desire to remain silent was admissible despite the conduct of FBI agents who asked if defendant wished to reconsider his position and showed the defendant a bank surveillance photograph of himself participating in the robbery).

II. *Use of the Reconstructed Record*

Petitioner contends that the reconstructed portions of the pre-trial record do not adequately address two issues: (i) whether the prosecutor used peremptory challenges to improperly exclude blacks from the jury; and (ii) whether the jury had been tainted by pre-trial publicity. Petitioner claims that, as a result of the inadequacy of the record, he was unable to argue those issues effectively on appeal. Petitioner contends that the state's failure to provide him with a verbatim transcript of the *voir dire* examination is a denial of his due process right to a meaningful appeal.

It is well established that the absence of a verbatim transcript is not a defect of constitutional magnitude where an adequate alternative is provided:

> Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript.

Mayer v. City of Chicago, 404 U.S. 189, 194 (1971). "A reconstructed record can accord effective appellate review. This is especially true where the state appellate rules establish a procedure for reconstruction of the trial record." *Morgan v. Massey*, 526 F.2d 347, 348 (5th Cir.1976) In New Jersey reconstruction of the trial record in the state courts is governed by N.J. Ct.R. 2:5-3(e).

The lost or destroyed stenographic tapes from the petitioner's trial included eight days of pretrial motions and in-camera *voir dire* of prospective jurors.[10] Also missing was the October 26, 1977 trial testimony of one of the

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[10]The eight days were October 11 through 14 and October 17 through 20, 1977.

State's witnesses, a Sergeant James Edwards of the Paterson Police Department; a December 8, 1977 motion to interview the jurors who had deliberated; and the December 21, 1977 sentencing proceedings.

Hearings to reconstruct the record for the days which stenographic tapes were unavailable were held before two judges[11] who were involved in the trial of petitioner's case. At the reconstruction hearings the State called Bruno Mongiardo, the assistant prosecutor who conducted the trial, and Adolph Galluccio, the designated attorney of the Public Defender's Office who defended the petitioner at the trial. Each judge involved in the trial proceedings filed a statement certifying and settling the record as to those aspects of the trial events held before him in 1977 for which stenographic tapes were unavailable. Those statements, along with all trial notes of the attorneys involved were reviewed, along with the court clerk's minutes of the trial proceedings. Verbatim transcripts of the reconstruction hearings were prepared and made part of the record, along with all exhibits introduced at those hearings.

The appellate court noted that, at the reconstruction hearings, the court took "great pains" in *voir dire* to ensure a proper jury selection process. Furthermore, the appellate court observed that, despite the fact that the petitioner was

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[11]As noted, the first trial judge had to be hospitalized after the jury was selected. A different judge then conducted the trial and the sentencing proceedings. Separate reconstruction hearings were held before each judge.

given ample opportunity to supplement the record of these trial proceedings at the reconstruction hearings, he filed no objections with either judge as to the substance of the reconstructed record.

Ultimately, the appellate court concluded that petitioner's claim must fall because *State v. Gilmore*, 103 N.J. 508 (1986), upon which petitioner based his claim, could not be applied retroactively to the petitioner's case. In *Gilmore*, the New Jersey Supreme Court declared that, under the state constitution, a defendant is entitled to a trial by an impartial jury without discrimination on the basis of religious principles, race, color, ancestry, national origin or sex. 103 N.J. at 524. The *Gilmore* Court specifically limited the retroactive effect of its holding.

It is a well established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts. *See Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). The application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state substantive law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised by a petitioner or are in themselves dispositive of his case. *Id.*

The appellate court's conclusion regarding the petitioner's *Gilmore* claim was clearly based upon that court's interpretation of state substantive law. Moreover, it was dispositive of the petitioner's claim. Consequently,

it is not reviewable in the petitioner's federal habeas proceeding.

Furthermore, petitioner's contention, that the inadequacy of the record prevented him from establishing on appeal that the jury had been tainted by pre-trial publicity is meritless. Essentially, this is a reformulation of petitioner's argument that his motions for a change of venue and a foreign jury were wrongfully denied by the trial judge. Those contentions are addressed below.

III. *Conduct of the State Shocks the Judicial Conscience*

Petitioner contends that the state should be estopped from utilizing the reconstructed record because the state's conduct throughout the history of the case shocks the judicial conscience and violates principles of fairness, due process and justice.

The appellate court concluded that the state's actions could not be characterized as obstructionist or antagonistic. The court concluded that the state had every right to oppose petitioner's applications for post-conviction relief and habeas corpus relief due to the fact that state remedies had not been exhausted.

Previously, I observed the difficulties which petitioner faced in obtaining appellate review of his conviction. In my earlier opinion I concluded that in many respects, the state's excuses were "untenable" given the fact that petitioner's failure to comply with the appropriate procedural requirements on appeal was

attributable to the misguidance (or lack of guidance) he received from his counsel. Indeed, the state's position may have been insupportable, but I do not find that the state acted in an obstructionist or antagonistic manner. Thus, I conclude that petitioner's claim is without merit.

IV. *Delay of Appeal*

Petitioner contends that the delay in furnishing the transcripts and the delay in prosecuting his appeal constitutes a denial of due process and his right to a speedy appeal in violation of petitioner's sixth and fourteenth amendment rights.

In my earlier opinion, I observed that the appropriate remedy accorded a defendant who has been denied the right to appeal is to move for an order requiring the state court to make available an appeal *nunc pro tunc.* I further observed that an appeal, at such a late date, may not be feasible because of the difficulties in obtaining the trial transcripts. As discussed above, however, after the issuance of the conditional writ of habeas corpus, the state made diligent efforts to reconstruct the missing portions of the record. I am satisfied that the record furnished by the state was sufficient to give petitioner an effective appeal to the appellate courts. As evidenced by the opinion of the appellate court, petitioner has been accorded a meaningful appeal in the state courts. Consequently, the due process violation alluded to in my earlier opinion has been cured.

V. *Insufficient Evidence*

Petitioner's fifth ground is based upon two contentions. First, the petitioner argues that there was a "total dearth of physical, corroborative or direct proof" against him at trial. Second, the petitioner argues that the pre-trial identification procedures employed by the authorities created a substantial risk of misidentification.

The Due Process Clause of the Fourteenth Amendment prohibits the criminal conviction of any person except upon proof beyond a reasonable doubt as to each element of the offense charged. *In re Winship*, 397 U.S. 358 (1970). However, great deference is paid to decisions reached by the trier-of-fact. When a state court conviction is challenged on the ground of insufficient evidence, habeas corpus relief is appropriate only if the evidence produced at trial, when viewed in the light most favorable to the prosecution, could lead no rational trier-of-fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979).

There was sufficient evidence produced at petitioner's trial to suggest that the petitioner was guilty of the offenses with which he was charged. After hearing this evidence, the jury determined that the elements of charged offenses had been proven beyond a reasonable doubt, and they returned a guilty verdict on each count. Upon review, it is clear that a rational fact finder could have reached the same conclusion. Therefore, petitioner is not entitled to relief on this claim.

Petitioner also contends that the photograph of him with Wilson and Phillips at police headquarters which appeared in the Saturday May 28, 1977 edition of *The Paterson News* irreparably prejudiced him by creating a substantial likelihood of misidentification by certain witnesses. In addition, petitioner argues that the photographic array shown to those witnesses was substantially misleading.

The Due Process Clause of the Constitution forbids the use of identification procedures which are impermissibly suggestive and give rise to a very substantial likelihood of irreparable misidentification. *See Neil v. Biggers*, 409 U.S. 188, 197 (1972) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). However, since "reliability is the linchpin in determining the admissibility of identification testimony," *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), the suggestiveness of an identification procedure must be evaluated in light of the totality of the circumstances surrounding it." *Id.* at 104 (citing *Stovall v. Denno*, 388 U.S. 293, 302 (1967); *see also United States v. Conway*, 415 F.2d 158, 163 (3d Cir.1969), *cert. denied* 397 U.S. 994 (1970). Facts indicating that an otherwise suggestive identification is highly reliable may render the identification admissible. The Supreme Court has given substance and formal structure to this totality requirement by enumerating five factors to be considered when evaluating an identification procedure:

> (1) the opportunity for witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the

> criminal, (4) the level of certainty demonstrated by the witness at the time of confrontation, and (5) the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. at 199-20.

Application of these criteria to the facts of the instant case reveals that the admission of the identification testimony did not offend traditional constitutional standards. Taken as a whole, the out-of-court identifications possessed sufficient indicia of reliability to merit its inclusion at trial.

Furthermore, petitioner's counsel conceded at trial that the identification procedures utilized by police were not impermissibly suggestive but argued that the pre-trial identifications should be precluded under New Jersey Evid. R. 56(l)(b). In his petition for habeas corpus, petitioner argues that, despite exposure to the prejudicial techniques employed by the police, no witness could positively identify the petitioner at trial. Petitioner advances this argument in support of his contention that the procedures employed by the police created a substantial likelihood of misidentification. The events of trial, however, belie the petitioner's argument, Indeed, the fact that no witness (who was exposed to the newspaper photo or the photo array) was able to positively identify the petitioner at trial leads to the inexorable conclusion that the techniques employed during pre-trial identification *did not* lead to a misidentification at trial. As a result, this claim for habeas relief must fail.

VI. *Fair and Impartial Jury*

After the verdict was rendered, the petitioner moved for an order permitting examination of the 12 deliberating jurors regarding the verdict. Petitioner argued that there was evidence to indicate that jury was biased and that the verdict was against the weight of the evidence. The trial judge denied the motion.

The trial judge is vested with broad discretion when evaluating alleged juror misconduct and bias. *U.S. v. Coven*, 662 F.2d 162, 175 (2d Cir. 1981) *cert. denied*, 456 U.S. 916 (1981). The reason for such discretion is that the trial judge observes the jury on a day to day basis, and is in the best position to assess prejudice arising out of premature jury discussions. *United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984), *cert. denied* 469 U.S. 1085 (1984). The Third circuit in *Government of the Virgin Islands v. Gereau*, 523 F.2d 140 (3d Cir. 1975) *cert. denied*, 424 U.S. 917 (1976) established that normal jury pressures and/or influences do not warrant overturning the verdict. *Id.* at 151. Specifically, it enumerated violations which would in fact rise to the level of a Sixth Amendment violation:

> (a) exposure of jury to news items "about the matter pending before the jury;"
>
> (b) consideration by the jury of facts not on the record;

> (c) communications between third parties and jurors which are relevant to the pending case.

Id. at 150.

In the case at bar, petitioner points to letters written by one juror to defense counsel and the prosecutor after the completion of the case. After reviewing the letters in question, I conclude that none of the concerns raised by the Third Circuit in the *Gereau* case are implicated in this case. Consequently, petitioner's claim must is without merit.

VI. *Jury Instructions*

Petitioner contends that the trial judge erred in charging the jury by not giving more thorough instructions on identification, by improperly instructing the jury with respect to Wilson's immunity and by improperly instructing the jury that petitioner had, at age 16, been tried as an adult.

Questions pertaining to jury instructions are normally matters of state law and are not cognizable in federal habeas corpus review. *Grecco v. O'Lone*, 661 F.Supp. 408, 412 (D.N.J. 1987) (citations omitted). "Only where the giving of an instruction is so prejudicial as to amount to a violation of due process and fundamental fairness will a habeas corpus claim lie." *Grecco*, 661 F.Supp. at 412. *See also* 28 U.S.C. § 2254(a).

fairness will a habeas corpus claim lie." *Grecco*, 661 F.Supp. at 412. *See also* 28 U.S.C. § 2254(a).

In the instant case, I conclude that the instructions given by the trial judge comported with due process and fundamental fairness. As observed by the appellate court, the trial judge expressly advised the jury that no in-court identification had occurred and stressed the tentative nature of each witness' out-of-court identifications. Moreover, the judge properly instructed the jury that Wilson's immunity only applied to the use of his own testimony against him. Finally, while instructing the jury, the trial judge correctly stated that the petitioner's prior convictions could only be used to impeach his credibility and could not be considered as evidence of guilt. As noted by the appellate court, these instructions were consistent with state law. Accordingly, petitioner's claim is without merit.

VII. *Trial Error*

Petitioner contends that the trial judge committed numerous errors during the course of the trial. He contends that the cumulative effect of these errors is tantamount to a violation of his constitutional rights under the Fifth, Sixth and Fourteenth Amendments.

For an alleged error to constitute a due process violation, petitioner must prove that the error made his trial so fundamentally unfair that he was denied due process or some other specific constitutional right. *Cramer v. Fahner*, 683 F.2d 1376. 1381 (7th Cir.1982).

Petitioner contends that the trial judge erred by precluding defense counsel from eliciting the names of individuals named in an anonymous telephone call to the Patterson police.[12] At trial, however, defense counsel indicated that he had no interest in ascertaining the names of the individuals allegedly involved in the crimes. Thus, as observed by the appellate court, petitioner's grievance is rooted in his dissatisfaction with the strategy of defense counsel. Moreover, petitioner has not shown that the exclusion of these names rose to the level of a constitutional violation. Thus, his claim is without merit.

Petitioner argues that the aggregate effect of other trial errors denied him his right to a fair trial: (i) improper jury instructions; (ii) admission of hearsay testimony by Wilson and Phillips that they knew the petitioner; (iii) admission of expert testimony by a forensic expert who stated that the lead pipe contributed to the death of Dr. Doktor and expert testimony of Dr.Van Vooren regarding the death of Dr. Doktor; (iv) admission of petitioner's newspaper photograph; (v) the denial of petitioner's motions for discovery and a mistrial; (vi) admission of testimony of police officer who apprehended petitioner; and

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[12]On June 8, 1977 the Paterson police received an anonymous phone call. The caller stated that two of the men arrested were "right" and named two other men who were allegedly involved in the murder/mugging of Dr. Doktor and Mr. Marshall.

(vii) granting the state's motion to consolidate the indictments.[13]

The appellate court concluded that; "any errors that existed were harmless beyond a reasonable doubt." I concur with the findings of the state court. None of the alleged errors, either singularly or cumulatively, infected the entire trial so that the resulting conviction was violative of due process or fundamental fairness.

IX. *Recantation Testimony*

Petitioner also argues that the trial judge erroneously denied his 1989 post-conviction motion for a new trial based upon the recantation testimony of Wilson.

Great deference is afforded to the trial court in the determination of whether recantation testimony is credible. *See Government of Virgin Islands v. Lima*, 774 F.2d 1245, 1251 (3d Cir.1985) (quoting *United States v. Johnson*, 327 U.S. 106, 111-12 (1946)); *see also State v. Carter*, 69 N.J. 420, 427 (1967) ("The determination of the credibility or lack thereof of recantation testimony is peculiarly the function of the trial judge who sees the witnesses, hears their testimony and has a feel of the case.") Furthermore, courts have noted that "recantation of testimony given at trial are 'looked upon with the utmost suspicion.'" *United States ex*

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[13]The state moved to consolidate the indictment for the murder of Dr. Doktor and conspiracy to commit robbery of Dr. Doktor with the indictment for the robbery of George Marshall.

re. Rice v. Vincent, 491.F.2d 1326, 1332 (2d Cir.1974); *United States v. Mackin*, 561 F.2d 958, 961 (D.C.Cir.1977) *cert. denied* 434 U.S. 959 (1977).

In the instant case, there is no reason to doubt the trial judge's determination that Wilson's recantation was not credible. His findings were supported by the record and were consistent with the state law standards applicable to the petitioner's motion for a new trial.

X. *Excessive Sentence*

Finally, petitioner contends that his sentence is manifestly excessive and that the trial judge erred in failing to merge the convictions and in imposing a consecutive sentence.

Sentencing is a matter of state criminal procedure and so long as the sentence imposed falls within the statutory bounds, it does not implicate federal constitutional issues. *Jones v. Superintendent, Rahway State Prison*, 725 F.2d 40, 42-43 (3d Cir.1984).

The petitioner's sentence was within the statutory guidelines. Moreover, the decision not to merge the convictions was within the scope of the trial court's discretion. Consequently, petitioner has not raised an issue of constitutional magnitude. His claim, therefore, must fail.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is hereby dismissed without the issuance of a certificate of probable cause and without an evidentiary hearing. An appropriate order will be entered.

/s/ DICKINSON R. DEBEVOISE, U.S.D.J.

Dated: June 24, 1992

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 1, 1991

Mr. John Vincent Saykanic
4 Brighton Road
Clifton, NJ 07012

Re: Lawrence Simmons
v. New Jersey
No. 90-6999

Dear Mr. Saykanic:

The Court today entered the following order in the above entitled case:

The petition for writ of certiorari is denied.

Very truly yours,

/s/ William K. Suter, Clerk

APPENDIX G

SUPREME COURT OF NEW JERSEY
C-209 SEPTEMBER TERM 1990

32,417

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

LAWRENCE L. SIMMONS,
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-6277-87T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, at Trenton, this 16th day of October, 1990.

/s/ Stephen W. Townsend

CLERK OF THE
SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

FILED
October 22, 1990
Stephen W. Townsend
Clerk

APPENDIX H

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-6277-87T1

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

LAWRENCE L. SIMMONS,
Defendant-Appellant.

Argued: April 2, 1990 - Decided:
JUL 13, 1990
Before Judges Petrella, O'Brien and Havey.

On appeal from Superior Court, Law Division, Passaic County.

John Vincent Saykanic, Designated Counsel, argued the cause for appellant (Thomas S. Smith, Jr., Acting Public Defender, attorney; Mr. Saykanic on the brief).

Jane E. Hendry, Assistant Prosecutor, argued the cause for respondent (Ronald S. Fava, Passaic County Prosecutor, attorney; Ms. Hendry on the brief).

PER CURIAM

This appeal comes before this court *nunc pro tunc* as a result of an overlong history due to the failure of both defendant Lawrence L. Simmons and the Public Defender's Office to file an appeal, and Simmons' efforts to apply initially for relief from the jury's verdict of guilty of murder and related offenses to the United States District Court by way of *habeas corpus* proceedings as well as to the trial court by way of application for post-conviction relief. Simmons was charged in a Passaic County indictment, along with codefendants David Wilson[1] and Donald Phillips,[2] for the May 27, 1977 murder of Dr. David Doktor (N.J.S.A. 2A:113-1); murder while armed (N.J.S.A. 2A:151-5); and conspiracy to commit robbery (N.J.S.A. 2A:98-1).[3] Simmons and Phillips were charged in a separate indictment with the robbery (N.J.S.A. 2A:141-1) of a second individual a short time later on May 27, 1977. Simmons was tried separately and convicted on all charges after an 11 day jury trial in October and November 1977.

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[1]Wilson testified under a grant of immunity as the State's witness against the other defendants and in return the charge against him was subsequently dismissed.

[2]Codefendant Phillips was convicted on all counts in a jury trial shortly before Simmons' trial. He was sentenced to an aggregate term of life plus 21 to 25 years. His convictions were affirmed in *State v. Phillips*, Docket Number A-2924-77 on May 2, 1980. Certification was denied on July 17, 1980, 85 N.J. 115 (1980).

[3]All these offenses occurred prior to the adoption of Title 2C, the New Jersey Penal Code. Hence, the provisions of Title 2A were applicable at the time of the indictment, trial and sentence.

On December 21, 1977 Simmons was sentenced to life in prison on the murder conviction; a consecutive term of nine to ten years on the murder while armed conviction; a concurrent two to three year term on the conspiracy to rob conviction; and a consecutive sentence of 12 to 15 years on the conviction for the robbery of the second individual.

A review of the procedural history and related information now available is necessary in view of some of the arguments raised by Simmons. An aura of confusion surrounds the failure of Simmons' designated trial attorney or the Public Defender's Office to file an appeal, and even Simmons' own failure to file a notice of appeal, particularly in view of the history and his filing of various other *pro se* applications. The record before us contains copies of certain correspondence on the subject. In Simmons' copy of a March 13, 1978 letter to the Appellate Section of the Public Defender's Office in East Orange, Simmons asked whether a notice of appeal had been filed on his behalf. We assume the letter was sent and received but the record does not indicate any response to it. There are also copies of letters addressed to various judges in Passaic County asking for information which might be of assistance in connection with a "direct appeal.

In a September 1978 letter to Adolph Galluccio, the designated attorney appointed by the Public Defender to represent Simmons at trial, Simmons asked for relevant information to help him on his "direct appeal." A second letter to Galluccio dated September 29, 1978 asked "who is going to handle my appeal, if you're not gonna be assigned to my appeal." Galluccio responded on October 9, 1978,

that someone from the Appellate Section of the Public Defender's Office must handle the appeal and that he would cooperate with the appeal. A copy of that letter was sent to the Office of the Public Defender, Appellate Section. We again find no response in the record from the Public Defender's Office during this time period, although Simmons continued to write to his trial attorney for information through May 1979. The record also contains a May 14, 1979 letter addressed to Joel M. Harris of the Public Defender's appellate offices in East Orange. Simmons also wrote to the office of the Clerk of the Appellate Division inquiring about his appeal. The Clerk's office advised Simmons in a June 27, 1979 letter that no appeal had been filed on his behalf from any December 1977 conviction. Thus, prior to again writing the Public Defender and during his first application to the federal court in 1980, Simmons was clearly aware that no state court appeal had been filed from his convictions. Yet, Simmons did not seek to file a *pro se* appeal, although he was obviously able to and did file other *pro se* applications, including an appeal to the Third Circuit Court of Appeals and a petition for *certiorari* to the United States Supreme Court.

The first response from the Public Defender's office we observe in the record is an August 1, 1979 letter to Simmons in State Prison from James K. Smith, Jr., Deputy Public Defender, which stated that his office "had no record of your appeal." By copy of that letter he asked attorney Galluccio to contact his office "and perhaps we can file out of time. We will keep you informed."

Galluccio advised Simmons by January 18, 1980 letter that he had not filed a notice of appeal, his appointment as assigned counsel terminated at sentencing, and he was "not permitted to continue ... unless, specifically re-assigned by the Public Defender." On January 23, 1980 Simmons again corresponded with Galluccio and alluded to a representation that had been made concerning Galluccio's filing of a notice of appeal. A counselor at Trenton State Prison also wrote to Smith on January 29, 1980 concerning the status of an appeal.

On March 24, 1980, Simmons filed a *pro se* petition for a writ of *habeas corpus* in the federal court. That petition was denied by Judge Meanor for failure to exhaust state remedies. Simmons then appealed that denial to the Third Circuit Court of Appeals on June 2, 1980 and was assigned defense counsel who filed for an extension of time to prosecute the appeal. The Prosecutor's Office had no objection and Simmons was given 30 days from April 1, 1981 to file a brief and appendix. Defense counsel also moved for trial transcripts to be furnished. The Prosecutor's Office opposed the application for transcripts in view of Simmons' failure to exhaust state remedies.[4] The motion was denied by the Third Circuit without prejudice to an application for transcripts in the state court. The Third Circuit affirmed the denial of Simmons' writ of

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[4]Respondent's appendix is assembled by consecutive exhibit numbers, with each exhibit having its own independent page numbering. This is contrary to the rules which require the entire appendix to be numbered consecutively. R. 2:6-1(b). The first page number of each document should be listed in the index to the appendix.

habeas corpus. Simmons then submitted a *pro se* petition for *certiorari* to the United States Supreme Court which was denied on June 7, 1982. 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

An April 16, 1980 letter from Deputy Public Defender Smith to Galluccio referred to the fact that Smith had been advised by the Passaic County Prosecutor's Office that Simmons had filed a *pro se habeas corpus* petition claiming denial of his right to appeal in the New Jersey courts. The letter went on to state "Our office has no record of ever being requested to file an appeal in Mr. Simmons' behalf." That letter also requested information about whether Simmons had requested of Galluccio, as a pool attorney who handled the trial, that an appeal be filed within a reasonable time and concludes: "If he did request that an appeal be filed within a reasonable time, I would be willing to file a motion for leave to appeal *nunc pro tunc* if he still desires." Galluccio responded by an April 25, 1980 letter indicating that Simmons had requested that an appeal be filed and that he had advised him that the Appellate Section of the Public Defender's Office must do so.

Despite the fact that codefendant Phillips' appeal was decided on May 2, 1980, no notice of appeal in the state court had yet been filed by Simmons or on his behalf.

It is thus apparent that any delay in the filing of, an appeal or a motion to file a notice of appeal *nunc pro tunc* had not been due to the Passaic County Prosecutor's Office, but was due in large measure to either deficient communication or failure to act on the part of designated

counsel or the Public Defender's Office, as well as the failure of Simmons himself to file for relief directly with the Appellate Division, an option he had obviously demonstrated familiarity with on several occasions. Despite the correspondence between Simmons, Galluccio and the Public Defender's Office which indicated on several occasions the prospect of filing a notice of appeal out of time,[5] and repeated instructions by Galluccio to Simmons to contact the Public Defender's office to go forward with any appeal, and despite awareness of the lack of an appeal being filed (this was also implicated in the State's exhaustion of remedies arguments in the prior federal court proceedings), Simmons nonetheless elected to file a *pro se* petition for post-conviction relief in the trial court on July 12, 1982.

Hearings on Simmons' *pro se* petition were held on December 10 and 20, 1982. After an evidentiary hearing, Judge Marchese, the judge who had conducted the trial in 1977,[6] denied the petition. He observed that Simmons should be requesting leave to appeal *nunc pro tunc* and that he did not have jurisdiction to grant such an application. The judge found that subsequent to Simmons' convictions

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[5]Deputy Public Defender Smith advised Simmons of this in his August 1, 1979 letter. This was also stated in Smith's April 16, 1980 letter to Galluccio. As noted, the Clerk of the Appellate Division had advised Simmons in June 1979, that there was no appeal pending.

[6]The Simmons trial had originally been assigned to Judge Leopizzi who presided over the jury selection process. However, due to his emergency hospitalization the case was reassigned to Judge Marchese on October 21, 1977.

Simmons had been advised of his right to appeal by both the trial court and Galluccio. He also found that Simmons had expressed-a desire to appeal to his attorney who advised Simmons that the Public Defender's Office would handle the appeal. The judge specifically found that "Either because he was mislead [sic] or confused, defendant believed an appeal had been filed on his behalf by his trial attorney, when in fact no Notice of Appeal has ever been filed on defendant's behalf;..."[7] The judge concluded that Simmons had consistently maintained his desire to appeal and did not knowingly or intentionally waive his right to appeal. The judge considered that he was without jurisdiction to grant post-conviction relief for what was essentially an appeal from his conviction. However, he recommended that Simmons be permitted to file and pursue his appeal with the Appellate Division. These findings were embodied in an order dated and filed July 7, 1983.

On August 1, 1983, over five and one-half years after the convictions, the Public Defender, through designated counsel, finally moved for the first time to file a notice of appeal *nunc pro tunc*. The Passaic County Prosecutor's Office stated in an August 16, 1983 letter that in light of Judge Marchese's findings it left the resolution of the motion to the appellate court's discretion. In effect, it did not oppose the application. On August 17, 1983 the Public Defender filed a notice of appeal from the July 7, 1983 denial of post-conviction relief. However, on September

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[7]Of course, in June 1979 Simmons had learned from the office of the Clerk of the Appellate Division that no appeal had ever been filed from his 1977 conviction.

15, 1983), 1983 the Public Defender's Office forwarded an amended notice of appeal which now indicated, without obtaining leave to file an out of time appeal, that the appeal was from the December 21, 1977 judgment of convictions, and did not refer at all to the order denying post-conviction relief. This court entered an order on September 27, 1983 denying the motion to file the appeal *nunc pro tunc* and dismissing the appeal as untimely. Although the court did not state a reason for the denial in the order, we may presume it was dismissed because it was considered filed beyond a reasonable time. Not only was the motion long out of time under the rules, but it also came after a post-conviction relief application and *habeas corpus* proceedings. A motion for reconsideration of the denial of leave to appeal was denied on October 25, 1983. Throughout this entire time period, the Passaic County Prosecutor had interposed no objection to Simmons' application for leave to appeal in the State appellate courts.

Simmons' designated attorney then submitted a notice of appeal to the Supreme Court. In addition, an undated notice of petition for certification was filed as was a motion requesting an unspecified extension of time to file the petition. In the Supreme Court proceedings the State Attorney General's Office undertook representation of the State and sent a November 21, 1983 letter opposing the motion for extension of time to file a petition for certification because there was no indication of how much time was required to file the petition. Moreover, in light of the age of the matter, the Attorney General took the position that he would not consent to the motion. In a January 6, 1984 letter in opposition to the petition, the

Attorney General's Office pointed out that at that time there was no mention in the motion papers of any colorable issue and no demonstration of probable merit on the appeal, citing *James v. Francesco*, 61 N.J. 480 (1972). The Attorney General's Office also noted that while Simmons

> may have expressed a desire to appeal after his conviction, no seasonable application was filed with the Appellate Division. [Citation omitted]. Instead, defendant pursued his own course through the federal courts over the advice and opposition of the prosecution. Under these circumstances it cannot be concluded that the Appellate Division abused its discretion in denying relief and dismissing this extremely tardy appeal.

On June 19, 1984 the Supreme Court granted the motion for leave to file a petition for certification as within time. A letter in lieu of petition was filed on Simmons' behalf on December 15, 1983. In August 1984 a formal petition for certification was filed and served. The Attorney General's Office objected to the petition, primarily on the grounds of lack of timeliness and failure to pursue the matter in the State courts, despite that requirement being brought to the attention of Simmons and the Public Defender. The Attorney General's Office again pointed out that there was no mention of any colorable issue and no demonstration of probable merit. On November 7, 1984 the petition for certification was denied and the appeal gas dismissed. 99 N.J. 187 (1984).

The next action taken by Simmons was submission of a May 9, 1986 *pro se* notice of motion for "an order allowing defendant to file a *nunc pro tunc* Notice of Appeal" to this court. The Passaic County Prosecutor submitted a May 15, 1986 letter to the Clerk of the Court, for the first time indicating that it opposed the application for *nunc pro tunc* leave to appeal on principles of repose, stating that "the matter has already been disposed." The Prosecutor relied on the 1983 denial of the motion for leave to appeal *nunc pro tunc*, the denial of reconsideration and the 1985 denial of the petition for certification. Defendant's *pro se* motion for leave to appeal nunc @o tunc was denied on August 12, 1986.

Simmons thereafter filed another *pro se* petition for a writ of *habeas corpus* with the Federal District Court of New Jersey on October 27, 1986 in which he named as respondents the superintendent of the prison and the Attorney General of the State of New Jersey. The Attorney General's Office referred the matter to the Passaic County Prosecutor's Office for a response. On December 16, 1986 the Prosecutor's Office, filed its answer to the *habeas corpus* petition and indicated that "Copies of the pertinent exhibits, including briefs, transcripts and opinions of the courts will be forwarded under separate cover." By letter of December 22, 1986 the Prosecutor's Office sent "copies of the pertinent exhibits, including briefs, transcripts and opinions of the courts in reference to Respondent's answer to the Petition for Writ of Habeas Corpus...." Apparently, on September 17, 1987 a member of the staff of District Court Judge Debevoise contacted the Passaic County Prosecutor's office regarding the availability

of the 1977 trial transcripts. An assistant county prosecutor advised the judge in an October 2, 1987 letter that the supervisor of the county court reporters informed her that:

> ... the court reporters' notes for the entirety .of this trial are not available. Apparently, during the renovations to the Passaic County Courthouse years ago, all reporters' notes were relocated to another building across the street; during this period, that building suffered water damage and cockroach infestation, necessitating extermination measures. Due to these problems, all notes were again relocated across town to the Passaic County Administration Building. Mr. Scardilli [supervisor of court reporters] informs me that the reporters' notes of this trial cannot be found. As such, we are not able to supply the United States District Court with any transcripts of this trial, which occurred 10 years ago.

The Public Defender's office also informed Judge Debevoise that it did not have a copy of the trial transcripts because Simmons did not take a direct appeal through its office.[8] In a July 5, 1988 opinion, reported as *Simmons v. Beyer*, 689 F.Supp. 432 (D.N.J. 1988), Judge Debevoise dealt with whether Simmons was deprived of his "right to appeal" and whether he was denied effective

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[8]See text at note 5, *supra*. Up to this time the stenographer's notes or tapes of the trial had not been transcribed since no one had made a request for same. There is an obvious distinction between the stenographic tapes or notes and transcripts.

assistance of counsel.[9] The judge acknowledged that petitioner had only provided a cursory description of the grounds for his petition for *habeas corpus*, but he nonetheless considered his entitlement clear due to what he called (without adequate consideration of the effect of Simmons' own conduct) the "procedural nightmares" which had allegedly prevented him from obtaining appellate review of his convictions. 689 *F.Supp.* at 434. There were no "procedural nightmares." Any delay was due to the actions or reactions of defendant, his assigned attorney, and the Public Defender's Office. The opinion stated that the dismissal by another federal judge of Simmons' earlier *habeas corpus* petition for failure to exhaust administrative remedies was assertedly because of the availability of "an appeal *nunc pro tunc*, which is in theory available automatically under New Jersey law for criminal defendants who have 'within time' requested that an attorney file an appeal on their behalf." Ibid. No real authority was cited for this very broad pronouncement which was obviously made without regard to the reasonableness of the delay, length of time involved or other relevant circumstances. We

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[9]The Federal District Court is not in the line of appeal from state court decisions. See *State v. Norflett*, 67 *N.J.* 268, 286 (1975); *State v. Coleman*, 46 N.J. 16, 36 (1965), *cert.* den. 383 *U.S.* 950, 86 *S.Ct.* 1210, 16 *L.Ed.*2d 212 (1966). Aside from changes in the case authority between the period 1977 to 1980 (when it might have been expected that any appeal would have been decided) both on the federal and state levels, there are jurisdictional issues with respect to the District Court's intervention here, particularly where the United States Supreme Court had previously denied certiorari. Cf. *Butler v. McKellar*, 494 *U.S.*___, 110 *S.Ct.* 1212, 108 *L.Ed.*2d 347 (1990) *Penry v. Lynaugh*, 487 *U.S.* ___, 108 *S.Ct.* 2896, 101 *L.Ed.*2d 930 (1990); *Teague v. Lane*, 485 *U.S.* 933, 109 *S.Ct.* 1060, 103 *L.Ed.*2d 334 (1989), reh'g den. ___ *U.S.* ___, 109 *S.Ct.* 1771, 104 *L.Ed.*2d 206 (1989).

assume he was referring to *State v. Altman*, 181 *N.J. Super.* 539 (App. Div. 1981) (involving an appeal almost two and one-half years late).

Judge Debevoise had essentially considered the same arguments that were before the judge who had considered and dismissed Simmons' *pro se* post-conviction relief application for lack of jurisdiction and which were thereafter submitted in connection with the application for leave to appeal nunc pro tunc and in a petition for certification to the Supreme Court. Judge Debevoise's opinion also mistakenly indicated that Simmons' former counsel never informed the Public Defender's Office of Simmons' desire to appeal and that "the Public Defender never contacted petitioner offering to file an appeal *nunc pro tunc*." 689 F.Supp. 435. Obviously, those statements are not accurate since there was correspondence concerning this in 1979 and 1980.[10] Simmons obviously decided to do what he wanted to do when he wanted to do it, and that was to seek assistance and relief *pro se* in the federal courts and also by a *pro se* post-conviction relief application. In any event, although Judge Debevoise seemed to recognize inherent difficulties to the State in light of the then apparent problem of obtaining transcripts, he nevertheless issued a "conditional" writ of *habeas corpus* on July 5, 1980 to the effect that the writ would issue unless Simmons was granted an appeal with appointed counsel or was granted a new trial.

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[10]See note 5, *supra*. See also Galluccio's letter of October 9, 1978 to Simmons, copy to the Public Defender's Appellate Section, discussed at page 3, *supra*.

Ultimately, it was actually the Passaic County Prosecutor's Office, and not Simmons, that filed an application on August 9, 1988 with the clerk of this court on Simmons' behalf for leave to appeal *nunc pro tunc* and for a remand to the trial court to reconstruct the record. It was clearly in Simmons' interest to take no action at this point. We granted that motion. As it developed, the court reporters' tapes or notes in the matter of *State v. Lawrence Simmons*, Passaic County Indictments No. 737-77 and 970-77 were found for the trial dates of October 21, 24, 25, 27, 28, 31 and November 1 through 4 and 7 and 8, 1977. During the subsequent transcription and reconstruction process the court file and the trial notes of Judge Leopizzi concerning pretrial matters and the jury *voir dire* were obtained and forwarded to all parties, including Simmons' trial defense attorney.

Hearings with respect to reconstruction of the record were conducted before Judge Marchese on September 21, 1988 and later in the day before Judge Leopizzi. Two further reconstruction hearings were held before Judge Leopizzi. Thereafter, the trial court's certified statements and exhibits regarding the reconstruction hearings, along with all notes, documents and appendices marked into evidence and transcripts of the reconstruction hearings were filed with this Court.

Simmons subsequently filed a motion challenging the sufficiency of the reconstructed record in the federal court. That motion was denied on November 14, 1988.

On January 8, 1989, Simmons moved for a limited remand to the trial court (pursuant to R. 3:20-2) in order to seek a new trial on the ground of newly discovered evidence based upon affidavits of David Wilson recanting

his testimony at the 1977 trial. A supplemental certification was submitted on January 25, 1989. on February 9, 1989, we granted that motion and ordered that such remand proceedings be completed within 60 days. On March 9, 1989, a motion for a new trial was filed on Simmons' behalf with the trial court, returnable April 3, based upon Wilson's recantation. Evidentiary hearings were held before Judge Marchese on April 3 and 4, 1989. In an April 6, 1989 oral decision, the judge denied Simmons' motion for a new trial. An order to that effect was entered on April 10. Thereafter, Simmons filed an amended notice of appeal to include the denial of that motion in his appeal.

We need not consider further the procedural history of this matter or the appropriateness of prior rulings, but consider the merits of the issues raised. On this appeal Simmons asserts:

> I. His *Miranda* rights and Fifth Amendment constitutional and New Jersey state common law privileges against self-incrimination were violated; the admission of alleged statements made by Simmons constitutes reversible error.
>
> II. The State should be estopped from utilizing the reconstructed record in the case at bar as it is impossible for the defendant to have a full and meaningful appeal on this record; this record violates defendant's due process rights under the Fifth, Sixth and Fourteenth Amendments.
>
> III. The State should be estopped from utilizing the reconstructed record as the State's conduct throughout the history of this case shocks the

judicial conscience and violates all principles of fairness, due process and justice; defendant's Fifth, Sixth, and Fourteenth Amendment rights have been violated.

IV.The excessive delay in furnishing transcripts of defendant's trial and the delay in prosecuting defendant's appeal constitutes a denial of due process: defendant's Sixth and Fourteenth Amendment rights have been violated mandating reversal of defendant's conviction.

V.The verdict was contrary to the weight of the evidence in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and New Jersey Constitution and the defendant's convictions must be reversed. (Not raised below).

VI.Defendant's Fifth, Sixth and Fourteenth Amendment right to due process and a fair and impartial jury was violated in this case mandating a reversal of defendant's convictions; the court erred in denying defendant's motion to interview the jurors.

VII. The court erred in its charge to the jury and defendant was denied his Fifth, Sixth, and Fourteenth Amendment right to due process and a fair trial. (Partially raised below).

VIII. The court committed numerous errors which caused the defendant Simmons irreparable harm and denied the defendant of his Fifth, Sixth, and

Fourteenth Amendment right to due process and a fair trial.

IX. The court below committed reversible error and violated defendant's Sixth Amendment right to a fair trial by denying defendant's motion for a change of venue or a foreign jury.

X. The court below erred in granting the State's motion to consolidate Indictments No.737-77 and 970-77.

XI. The court below erred in denying the motion for new trial; defendant's due process rights were violated.

XII. Defendant's sentence is manifestly excessive; the court below erred in not merging the conviction under Indictment No. 970-77, and erred by imposing a consecutive sentence.

The following facts were developed at the trial. It is undisputed that early in the morning on May 27, 1977 (approximately 1:30 a.m.), Dr. David Doktor, an elderly physician, was responding to an emergency call to his home on 14th Avenue in Paterson to go to Barnert Memorial Hospital. Upon leaving his home he was brutally beaten and robbed. Dr. Doktor subsequently died from the blows sustained in the mugging. Additionally, on the same morning, George Marshall was mugged and severely beaten by two individuals.

During the early morning hours of May 27, 1977 (about 1:00 a.m.), David Wilson[11] had returned to the home of Donald Phillips at 738 East 23rd Street, Paterson, where Wilson had been living for some period of 'time. Wilson testified that Phillips and Simmons entered the apartment together, and that they "were smoking reefer and drinking beer." The beer was contained in quart bottles. Wilson had known Phillips at this time for approximately four months, but had not met Simmons prior to this night.

The three young men discussed stealing a car. Simmons stated "he wanted to do a stickup with the car." Phillips then asked Wilson, who apparently was adept at stealing cars, if he had any keys to General Motors cars. Simmons then produced a General Motors automobile key and, tossing it to Wilson, asked if it could be used to steal a car. Wilson replied that it might. Simmons then told the others that he knew of a car they could steal on 14th Avenue near 26th Street in Paterson.

Wilson accompanied Phillips downstairs to the first floor hall closet where Phillips obtained a yard-long length of auto exhaust pipe with grooves in it. When Wilson asked Phillips what the pipe was for, Phillips said it was to break the window of the car if the key didn't work. Wilson, who would be acting as the "lookout," would then "hot-wire" the car.

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[11]Wilson was the State's key witness in the case against Simmons. At trial Wilson's testimony implicated Simmons in the murder and mugging. Wilson recanted his testimony in 1985, after he was sentenced to State Prison, maintaining that he was coerced into lying at trial by the police and prosecutor.

On the night of the murder Simmons was wearing black pants, a short sleeved light blue polo shirt and a plaid shirt-type jacket. He also had on a sleeveless yellow undershirt with brown trim, a pair of black socks and suede shoes. Phillips also had on black pants, and wore a long sleeved black shirt, white athletic socks with black and yellow stripes and a pair of white Pro-Ked sneakers with blue and red trim. Wilson was dressed in a blue and white striped sweater, a blue belt, peach pants, a brown stocking cap and tan checked hat with a small front brim. He also wore a brown bodysuit and black, heeled shoes.

At 5'2" Wilson was the shortest of the three, but appeared about 515" in his high heeled shoes that night. Phillips was six feet tall. Simmons was about 516" tall and wore his hair in braids on the night of the murder.

At about 1:30 a.m., the three individuals left the house, and walked down East 23rd Street to 14th Avenue where they headed easterly towards 26th Street and the car Simmons had suggested they could steal. As they walked down 14th Avenue, Phillips carried the pipe and a quart bottle of beer. While Phillips stopped and waited for Simmons who had lagged behind, Wilson continued walking, and upon reaching 26th Street turned and saw Simmons, now about a block behind, place the beer bottle in the middle of 14th Avenue about 10 to 15 feet from the sidewalk.

Wilson crossed the 26th Street intersection and, while intending to wait for the other two individuals to catch up with him, was frightened by the headlights of a car driven by a Mrs. Garcia. Wilson hid in some bushes about a 100 feet from the corner and watched the woman park on 14th Avenue near the corner of 27th Street and

exit her vehicle. After parking the car Garcia started toward her house and then went back to the car where she had left her house key. After retrieving her key, she went into her house. Emerging from the shrubs, Wilson stood and watched Simmons and Phillips cross 26th Street. Wilson then started walking up 14th Avenue. Eventually, Phillips and Simmons caught up with Wilson at the intersection of 27th Street. As the two men approached him, walking side-by-side, Wilson saw that Phillips was still carrying the pipe.

Mrs. Garcia lived in the house on the corner of 26th Street and 14th Avenue. As she stood on her front porch, which faced 26th Street, and opened her front door, she saw a black man near the corner walking on 26th Street in front of her house as if he were "looking for something." She got a glimpse of the side of this man's face and observed that he had "puffy cheeks and well, like braids or something on the head." She went inside and later peered out her kitchen window, which overlooked 14th Avenue, and saw two black men dressed in dark clothing walking on her side of 14th Avenue towards 27th Street. She testified "they were walking, had something in their hand, like a stick or something, between both men." After she lost sight of the individuals, Garcia went outside to the edge of her porch, fearful that someone was looking into her car, looked up 14th Avenue, saw movement in the distance and then went inside.

As Simmons, Phillips, and Wilson gathered at the intersection, about to make a right turn onto 27th Street, Simmons said "there goes a car we can steal." Simmons indicated an old car, which was parked on 14th Avenue near the intersection. The three men walked down 14th

Avenue towards the car which was parked in front of a newer vehicle. Wilson stopped near a driveway, about 20 feet from the newer car, as Simmons and Phillips stood behind the intended vehicle.

Meanwhile, during those early morning hours of May 27, 1977, Mrs. Purtell, a registered nurse affiliated with Barnert Hospital in Paterson, was on duty in the hospital's morgue. At 1:30 a.m., she telephoned Dr. David Doktor, advising him that there was a medical emergency at the hospital, located a few blocks from the physician's home. Dr. Doktor dressed and, approximately 15 minutes later, left his residence on 14th Avenue.

From his lookout position, Wilson saw the elderly physician descending the front stairs of his house about 20 feet away. Simmons and Phillips were hiding behind a car a few feet or so away from the man. Upon noticing the man, Phillips tapped Simmons on the arm and said "let's get him."

According to Wilson, as the doctor walked between the two parked cars, Simmons "came up from behind and punched him in the face," knocking him to the ground. Phillips then grabbed the "old man" by the shoulders, dragged him into the roadway and started punching him in his face. According to Wilson, Simmons "was hitting him in his body and then the lower part of his body. The man then went down to the ground. Then he tried to get up, as he was getting up he was moving himself in front of the car. Mr. Simmons then came over and punched him in the stomach." Phillips then removed a piece of plastic from his back pocket, wrapped it around his hands, and retrieved the pipe from its hidden location near the rear tire of the old

car that the three were attempting to steal. Phillips repeatedly struck the doctor in the head with the pipe.

By this time, Wilson had moved closer, and was now standing between the two parked cars about 5 feet from Phillips, the defendant and their victim. He watched as Phillips continued to bludgeon the doctor's head with the pipe and stated "he hit him a number of times." As Phillips was hitting the doctor with the pipe, Simmons was punching him "in the stomach and his back and his ribs and his side." Finally, Simmons kicked the doctor in the head. He then grabbed the physician's back pants pocket and ripped it off his pants, taking with it the doctor's wallet. Simmons, Phillips and Wilson then fled, leaving the unconscious doctor bleeding and lying in the roadway.

Phillips and Wilson fled across the street. Simmons, however, ran up a driveway located on the same side of 14th Avenue. As the two men ran across the street, Phillips was unwinding the plastic from his hands. While he was fleeing, the plastic snagged on a fence across the street from the murder scene where the police found it.

Defendant Simmons eventually caught up with Phillips and Wilson on the corner of 14th Avenue and 27th Street. Wilson first saw Simmons as he rounded the corner of 28th Street and noticed that he was not wearing the plaid jacket he had on when the three men had left Phillips' residence. The three men then raced down the opposite side of 14th Avenue towards 23rd Street and the School 13 playground. Phillips, who still held the pipe as they ran, threw the pipe away as they fled down 14th Avenue. It was later recovered by the police.

Meanwhile, Mrs. Garcia, who had earlier driven to her 26th Street home, sat in her kitchen. A little later, after initially looking out her kitchen window and observing the two men walking up 14th Avenue, she again looked out her kitchen window, this time to see three men running down the opposite side of 14th Avenue towards 25th Street.

At 2:00 a.m., another witness left work and started her 8 to 10 minute trip home to Elmwood Park. As she drove east on 14th Avenue she observed, about one-third of the way into the block between 25th and 26th Streets, an empty beer bottle in her lane of traffic. In order to avoid hitting the bottle, she had to swerve and drive into the opposite lane. About a block and one-half further away, her headlights picked up what "appeared to me to be a bundle of rags, garbage, there was something laying in the road." As she drove closer, she saw that it was not rags, but a body lying on the south side of 14th Avenue.

Upon reaching the corner of 14th Avenue and 23rd Street, Simmons, Phillips and Wilson entered the School 13 playground. When Simmons announced that the doctor's wallet contained no money Phillips told him to "go hide the wallet." While Phillips and Wilson waited and watched, Simmons ran to Phillips' house and returned "a few minutes later."

The trio then spotted George Marshall coming through the playground. Phillips said "let's get a quarter off him." Simmons replied "let's go." They walked up 23rd Street, past Marshall, and then turned around. Simmons and Phillips followed Marshall across the street to the corner of 23rd Street and 14th Avenue, while Wilson stood on the school yard side of 23rd Street. Phillips approached

Marshall and asked for a quarter. When Marshall replied that he did not have one, Phillips told him "you're a liar" and punched Marshall in the eye. Marshall grabbed Phillips and threw him against a nearby fence. At this point, Simmons came up behind Marshall and ripped his pocket off, taking Marshall's wallet. As his attackers walked away down 23rd Street, Marshall called out, referring to the wallet, "I don't know where you're going because there is nothing in it." Simmons then brought the wallet back to Marshall and beat him up once again. Afterwards, Marshall discovered that two dollars and some change were taken from him. Marshall later described Simmons as having a "sort of muscular build and looked like he was a little shorter than the other gentleman and he had like a white slipover tee shirt or some kind of shirt, slipover shirt on, short-sleeved." In addition, Marshall stated that Simmons. had a "short hairdo, like it was braided."

Anthony Giordano was asleep in his home, located on the corner of East 23rd Street and 14th Avenue. Sometime after 2:00 a.m., Giordano was suddenly awakened by a strange noise. He went to the kitchen and looked out the window overlooking the corner. Since there was a street light on, Giordano was able to see what he thought to be three black males mugging a white male. One of the blacks was beating the white male as the other two were "just standing by." Giordano yelled out the window and told the men to leave the man alone. In reply, one of the attackers told Giordano to "shut up."

At the approximate time of the robbery, another Paterson resident, Mrs. Bagby, who lived on 23rd Street was awake in bed waiting for her daughter to come home. She testified that she was disturbed by "someone that was hollering, trying to get some help." She said that what she

heard sounded like "a man yelling and it sounded like he was being mugged or attacked or something." She then went outside onto her front porch to see if her daughter, who she knew had just arrived in a car across the street, was all right. Still hearing the man yelling, she returned inside to telephone the police and report a mugging.

Meanwhile, her daughter was seated in a parked car on the right hand side of 23rd Street near 14th Avenue where she observed two black youths assault a white man while a third black youth watched. She stated "I saw a Caucasian man coming down the street and three black youths passing him and then turning around, and two of the black youths grabbing him; one grabbed him and held him and the other began to strike him and they were pulling at his pocket, at his back pocket." She began to flash the car lights on and off and honk the horn hoping that she would scare the attackers away. She described the young black men as ranging from 515" to 519" in height. She stated that one of the individuals had on a white short sleeved pullover shirt and corn rows in his hair. The second man wore dark clothing. She described the third person, the nonparticipant, as about 515" tall and wearing a wide or white striped sweater.

After Mrs. Bagby called the police she again went outside, down her front stairs and halfway into the street, calling out that she had notified the police. She repeatedly yelled out to determine if the victim was all right. A tall black male then came around the corner and told her that "the mf'er is all right." She described this individual as seeming "to be tall, about my complexion. His hair was sort of close-cropped, I don't know if it was braided or it was cut close, by that I meant it wasn't brushed in an afro." She watched for approximately two or three minutes as the

three black men walked past the lighted intersection on 14th Avenue and 23rd Street and continued down 23rd Street toward School 13 and 15th Avenue.

Police patrol cars were quickly dispatched to the area. As a result of the incident, Wilson was apprehended near 15th Avenue and 22nd Street. Phillips, who was perspiring heavily and smelled of alcohol, was apprehended near Madison Avenue and Ellison Place and Simmons was apprehended near the intersection of Ellison Place and Madison Avenue. Officer Micks noted that when he stopped Simmons, he had a very rapid heartbeat and appeared to be nervous. Simmons gave the officer his name and address and said that he was on his way home from visiting his sister, Wanda Addison. Simmons said he was uncertain of her address because she had recently moved.

Simmons was brought into police headquarters at approximately 3:00 a.m. on May 27, 1977. He was escorted into a room and told to read aloud the Miranda rights listed on a plaque on the wall. Simmons did so and then stated that he understood those rights. He told Detective Rafferty that he did not wish to say anything. About one hour later Detectives Rafferty and Hennion asked him if he knew Wilson and Phillips. Simmons denied knowing either of them. Simmons was also asked what he was doing in the area where he was apprehended. He replied he had been visiting his sister. The detectives later returned with Phillips and Wilson, who both identified Simmons in his presence, despite his statement that he did not know either of them. At about 10:00 a.m., Simmons was advised that Wilson had given police a written statement implicating Simmons in the murder. Simmons then stated "I figured he would squeal, that rat bastard. I will kick his ass when I get him over at the jail." Later in the afternoon,

as Simmons, Wilson and Phillips were being transported for booking in an elevator, Simmons told Wilson, according to Detective Rafferty's testimony, that he "will beat Wilson up when he gets him over in the county jail." Simmons testified and denied making any statements, except the one made in the elevator.

Mrs. Garcia later gave a description of the three young men she observed to Detective Torres, stating "that they were all black, young, between 16, 17 years old or maybe 18 years old wearing dark clothing. Also one was wearing a dark colored handkerchief of some kind around his head." At the police station, Garcia was also shown some photographs and indicated that one of them looked like one of the perpetrators, but that she was not sure. The next day as she read *The Paterson News*, she saw the three men depicted in the photograph and recognized Simmons' photograph as looking like one of the men she saw the night before. She saved the newspaper and turned it over to members of the Prosecutors Office later that summer, pointing out Simmons' photograph as being "similar" to one of the men she saw the night of the murder. In addition, she was shown an eight photograph array and identified Simmons' photograph.

Mrs. Bagby also saw a copy of *The Paterson News* the following day, and recognized two of the men depicted in the newspaper photograph as similar to the attackers of Marshall. Bagby pointed out Simmons' photograph as being similar to or resembling the assailant who stated that "the mf'er is all right." Bagby also described Phillips' photograph as "resembling the taller and slim one." While she was also shown the eight photograph array, she was not able to pick out any photographs of the assailants. Her daughter, also shown the photograph array, selected

Simmons' photograph as "the person closely resembles one of the people I saw that night."

Giordano also saw the photographs in *The Paterson News* and recognized one of the men as one of the three assailants of Marshall. Giordano was also shown the photographic array and selected the photograph of Simmons.

Marshall also saw the photographs on the front page of *The Paterson News* the following day and recognized those of Simmons and Phillips as "two gentlemen that looked [like] the two guys that ripped me off." Marshall was also shown the eight photograph array and selected two photographs. He chose the one of Phillips as it "resembles the guy that asked me for the quarter and hit me in the eye, the one I threw up against the fence." Marshall also selected Simmons' photograph stating "that's the one that took my pocket out and took my wallet." Marshall also identified Simmons in court as the man who "ripped my pocket off and took my wallet."

Michele Yacco, a forensic chemist with the New Jersey State Police, qualified as an expert witness at trial and testified that she examined the clothing Simmons, Wilson and Phillips were wearing for blood stains. She said she found no traces of blood on them. Yacco also analyzed the clothing of Dr. Doktor and found blood on the sports jacket, the red slacks, the right and left shoes, the pink shirt, the undershirt, and the pair of boxer shorts. Yacco analyzed Doktor's blood type and found that it was blood type "O." She said she tested and analyzed five areas of blood stains on the length of pipe and concluded they were of human origin and blood type "A.

However, Richard Coumbis, the chief state toxicologist, testified that he examined the pipe, and that based on his tests the blood found on the pipe was type "O." Coumbis testified that in his opinion Doktor's injuries, as depicted in certain State exhibits, specifically the ridges and depressions appearing on the victim's head, were consistent with the ridges and depressions on the pipe.

Coumbis knew before he analyzed the blood that the pipe had previously been examined by State Police Lab personnel who had identified the blood as type "A." He also knew that the victim's blood type was "O." Coumbis did not retest the areas of the pipe which had been tested previously.

Simmons testified at trial that on May 26, 1977 he resided at 3 12th Avenue in Paterson with his mother, brother and sisters, and that he left home to go to the poolroom sometime that evening. He said he later returned and left the house again between 10:30 and 11:00 p.m. to go to the house of his sister, Wanda Addison who had been living for two or three weeks on the first floor at a house on East 23rd Street where Phillips' mother lived upstairs. Simmons testified that he and Phillips didn't get along and that he did not associate with Phillips.

Simmons testified that he later answered a knock on the door and observed "two short dark-skinned men." Simmons testified that he did not know either of the men, but later learned that one of them was David Wilson, whom he had seen previously a couple of times on the street. Simmons said that he had also seen the other person on the street, but did not know him.

Simmons maintained that Wilson was wearing a stocking cap on his head. The other individual was short, dark skinned, with "short cut hair." After opening the door, Simmons returned to his sister's apartment and did not know where the two individuals went. Simmons said he later heard footsteps coming down the stairs and observed Phillips, wearing a long black shirt and black pants, and the two other individuals on the porch. The three then left the porch.

Simmons said he had a can of beer with his sister,, and left his sister's apartment at about 1:45 to 2:00 a.m. He then began walking down 23rd Street back to his mother's house. After crossing 15th Avenue, Simmons observed Phillips and a white man with two other persons whom he did not recognize. Simmons testified that Phillips and the white man were "tussling, arguing or fighting..." Simmons asserted that he yelled "hey" and started walking through the School 13 playground towards Ellison Place.

I

On October 28, 1977, during the trial, a *Miranda*[12] hearing was held. The judge found that Simmons' statements denying that he knew Phillips and Wilson were admissible; the statement in the interrogation room that Simmons knew the bastard would squeal was voluntary and made with full knowledge of his constitutional right to remain silent; and that the remark made by Simmons in the elevator was also voluntary and admissible. Simmons'

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[12]*Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

objection to the admissibility of his statement that he had been visiting his sister was overruled.

The prosecutor successfully argued that certain of the statements made by Simmons were not the product of custodial interrogation. Thus, when Simmons was being advised of something that had occurred, i.e. the fact that Wilson had made a statement, Simmons blurted out that he knew Wilson would squeal and that he would "get the rat bastard" at the jail. This statement was given when Simmons was told that Wilson had given a statement.

Simmons argues that the admission of these statements violated his *Miranda* rights, Fifth Amendment rights, and New Jersey State common law privilege against self-incrimination. He also argues that the plaque from which he read his rights was itself deficient because it did not contain a warning to the effect that he could exercise his right to remain silent at any time during the questioning. We reject that argument as without merit. See *State v. Sherwood*, 139 *N.J. Super.* 201, 205 (App. Div. 1976), certif. den. 70 *N.J.* 517 (1976).

In the course of the Miranda hearing a Paterson detective did not testify that Simmons did not wish to say anything after being advised of his *Miranda* rights. During cross-examination at the trial, however, the detective said that after Simmons had been given his rights he said he did not want to say anything. The detective said that he did not put anything in his report about it because Simmons had not told him anything and had only denied involvement in the crimes.

Following the detective's testimony, defense counsel moved for a mistrial on the ground that Simmons had invoked his right to remain silent and that interrogation should have ceased. The judge denied the motion, concluding that, under *Miranda*, questioning or interrogation must cease automatically when there was a request for counsel, but there was no such absolute requirement when the defendant merely exercised the right to remain silent. The judge also ruled that the statement made by Simmons after being advised by the detectives that Wilson had given a statement was not interrogation, but merely communication of new facts to Simmons. The judge relied on Justice White's concurring opinion in *Michigan v. Mosley*, 423 *U.S.* 96, 107, 96 *S.Ct.* 321, ___, 46 L.Ed.2d 313, 323 (1975). He thus concluded that those fact statements did not constitute a violation of the *Miranda* rationale following Simmons' declining to talk to the police, and hence those responses were admissible.

The Supreme Court in *Michigan v. Mosley*, *supra* (423 *U.S.* at 104) noted the "coercive pressures" inherent in a custodial setting and focused on a passage from *Miranda*:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; and a statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut-off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after

> the privilege has been once invoked. [423 U.S. at 100-101, quoting *Miranda* 384 *U.S.* at 473-474, 86 *S.Ct.* 1602, 16 *L.Ed.*2d 694].

In delivering the opinion of the Court in *Mosley*, Justice Stewart referred to that language in *Miranda* and stated:

> This passage states that 'the interrogation must cease' when the person in custody indicates that 'he wishes to remain silent.' It does not state under what circumstances, if any, a resumption of questioning is permissible. The passage could be literally read to mean that a person who has invoked his 'right to silence' can never again be subjected to custodial interrogation by any police officer at any time or place on any subject. Another possible construction of the passage would characterize 'any statement taken after the person invokes his privilege' as 'the product of compulsion' and would therefore mandate its exclusion from evidence, even if it were volunteered by the person in custody without any further interrogation whatever. Or the passage could be interpreted to require only the immediate cessation of questioning, and to permit a resumption of interrogation after a momentary respite.
>
> It is evident that any of these possible literal interpretations would lead to absurd and unintended results. To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purpose of Miranda by allowing repeated rounds of questioning to undermine

the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt 'fully effective means ... to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored....' [Citations omitted]. The critical safeguard identified in the passage at issue is a person's 'right to cut off questioning.' [Citations omitted]. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has

> decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was scrupulously honored. [Footnotes omitted]. *Michigan v. Mosley*, *supra* (46 *L.Ed.*2d at 320-321).

Neither *Miranda* nor *Mosley* give specific guidelines under what circumstances, absent a request for an attorney, the authorities may resume interrogation, or inquire whether a suspect is willing to reconsider his refusal to talk.[13]

In *Edwards v. Arizona*, 451 *U.S.* 477, 101 *S.Ct.* 1880, 68 *L.Ed.2d* 378 (1981), reh'g den. 452 *U.S.* 973, 101 *S.Ct.* 3128, 69 *L.Ed.*2d 984 (1981), the requirements of a knowing waiver were considered. *Edwards*, however, is not applied retroactively. *Shea v. Louisiana*, 470 *U.S.* 51, 105 *S.Ct.* 1065, 84 *L.Ed.*2d 38 (1985); *Solem v. Stumes*, 465 *U.S.* 638, 104 *S.Ct.* 1338, 79 *L.Ed.*2d 579 (1984).

State v. Hartley, 103 *N.J.* 252 (1986), decided nine years after Simmons' conviction, considered whether a defendant's right to cut-off questioning was scrupulously honored. *Hartley* held that before an accused's previously asserted right to remain silent may be deemed to have been "scrupulously honored," law enforcement authorities must, at a minimum, readminister *Miranda* warnings. The Court held that absent renewed warnings, an inculpatory

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[13]Defendant in *Mosley* had been arrested on suspicion of robbery and advised of his rights. The suspect said he understood his rights and did not want to talk to the police about the robberies. His interrogation was promptly terminated. After about two hours another police officer advised defendant of his rights and asked questions about a different offense, a homicide. It was held that those statements could be used against defendant at his murder trial.

statement given in response to police-initiated custodial interrogation after the right to silence had been invoked is inadmissible. The majority in *Hartley* also concluded that failure of the police to scrupulously honor an accused's invoked right to silence was not only a violation of *Miranda*, but of the privilege against self-incrimination. 103 *N.J.* at 256. The *Hartley* holding was later clarified and explained in *State v. Trapp*, ___ *N.J.* ___ (1990), which held that fresh *Miranda* warnings are not required when the accused's previously invoked right to silence has been scrupulously honored, but the accused initiates dialogue with the authorities regarding the investigation.

There are different aspects to the *Miranda* issue in this appeal. One is whether what occurred amounted to interrogation. A second is, if so, whether Simmons is entitled to retroactive application of *Hartley* in light of the lengthy time period that has elapsed in this case, the "now for then" nature of this appeal by virtue of a *nunc pro tunc* order after prior denials and other proceedings, and the circumstance that although in one sense this may be considered a direct appeal, in another sense it is not since it actually follows post-conviction relief proceedings and federal *habeas corpus* proceedings. Obviously, many of the cases relied on in the *Miranda* argument had not been decided at the time the trial was conducted, or even within the time it would have been expected for an appeal to take, for example, as compared with the appeal of codefendant Phillips.

In *Hartley*, the majority opinion noted that the "scrupulously honored requirement" in *Miranda* and *Michigan v. Mosley* is defined so vaguely that it offers little guidance to lower courts or the police. Hence, the *Hartley*

Court in 1986 imposed, presumably for ease of administration, a *new* "bright-line rule":

> We need go no further today, in respect of *Mosley's* impact on this case, than declare as indispensable to a permissible resumption of custodial interrogation of a previously warned suspect the furnishing of fresh *Miranda* warnings. Unless the police follow this 'bright-line,' inflexible, minimum requirement, a defendant's statement made in the above-stated circumstances cannot be admitted into evidence as part of the prosecution's case in-chief. *See also State v. McCloskey*, 90 *N.J.* 18, 30 n.3 (1982) ('prosecution cannot use any statements made during [the defendants] second interrogation before which new Miranda warnings were not given').
>
> Although the Supreme Court specifically avoided, in *Mosley* the adoption of a 'per se' test for determining when a suspect's previously-invoked right to silence had been 'scrupulously honored,' we nevertheless are convinced that our establishment of a 'bright-line' minimum requirement of renewed warnings for determining when that right has *not* been scrupulously honored not only is sound as a matter of New Jersey common law, but is also consistent with the spirit of the Supreme Court's decisions and hence with the federal law as we understand it. (Emphasis in original). [*State v. Hartley*, *supra* (103 *N.J.* at 267-268].

After a review of previous United States Supreme Court holdings in this area, the *Hartley* majority concluded:

> In view of the foregoing persuasive authority, we are convinced that the failure to honor a previously-invoked right to silence smacks so inherently of compulsion that any statement following that failure is involuntary by definition. So here, FBI agent Frieberg's failure to readminister *Miranda* warnings was a violation of the obligation scrupulously to honor Hartley's asserted right to silence, and therefore amounted to a violation of defendant's Fifth Amendment and State common-law right not to be compelled to be a witness against himself. [*State v. Hartley, supra* 103 *N.J.* at 278).

However, we conclude that *Hartley* is not applicable and does not affect the trial judge's *Miranda* ruling in this case. The fact that the police brought Wilson and Phillips into the room to identify Simmons was not custodial interrogation. The police, as a normal incident to custody and arrest, had the right to have other witnesses, who, inlcuding those Simmons had said he did not know, identify Simmons if they could. Likewise, the police did not conduct interrogation when they advised Simmons that Wilson had given a statement which incriminated him. This statement was indeed the truth, as contrasted with the type of false statements that the United States Supreme Court dealt with in *Miranda* and other cases.

Rhode Island v. Innis, 446 *U.S.* 291, 100 *S.Ct.* 1682, 64 *L.Ed.*2d 297 (1980), is not controlling since it involved an express request for counsel after being advised of *Miranda* rights. The *Innis* court did discuss the meaning of "interrogation" under *Miranda* and concluded that although the language in *Miranda* seemed to relate to "questioning," it did not construe "interrogation" so narrowly. However, it pointed out that one of the practices discussed in *Miranda*

was the use of lineups in which a coached witness would pick the defendant as the perpetrator of a different offense and that this was designed to establish that the defendant was guilty as a predicate for further interrogation. 446 *U.S.* at 299. Hence, the use of such "psychological ploys' was considered "to amount to interrogation." *Ibid.* The *Innis* Court stated:

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

> [Footnote omitted]. [Emphasis in original]. [446 *U.S.* at 300-301; 100 *S.Ct.* at ___, 64 *L.Ed.*2d at 307-308].

Thus, the United States Supreme Court concluded that Innis had not been "interrogated" within the meaning of *Miranda* where the police officers had merely engaged in a conversation in his presence in a patrol car about the danger to young children in the area finding the weapon the perpetrator had hidden. The Court said that from this dialogue between the two officers, to which no response from the respondent was invited, it "cannot be fairly concluded that the respondent was subjected to the 'functional equivalent' of questioning." *Rhode Island v. Innis*, *supra* (446 *U.S.* at 302, 100 *S.Ct.* at __, 64 *L.Ed.*2d at 309). The Court then considered the second prong of the definition of "interrogation," whether the officers should have known that the respondent would suddenly be moved to make a self-incriminating response to the conversation between the officers. The Supreme Court answered this question in the negative in light of the brief and offhand nature of the remarks. Hence, it reversed the Rhode Island Supreme Court which had "erred, in short, in equating 'subtle compulsion' with interrogation." *Rhode Island v. Innis*, *supra* (446 U.S. at 303, 100 *S.Ct.* at 64 *L.Ed.*2d at 309). The case was remanded for trial. But cf. *State v. Ward*, _ *N.J.Super.* ___ (App.Div.1990) (detective's confrontation of prisoner in cell was held functional equivalent of interrogation).

In this case, we view the police actions and comments as usual and typical in a police investigation. Informing Simmons that the other two suspects had stated that they knew him, and later advising Simmons that Wilson had given a statement implicating him, was not interrogation, but was informing Simmons, attendant to an

arrest and custody situation, of relevant (and truthful) information which he would certainly want to know, particularly since it formed a basis for his continued custody on serious charges and served to inform Simmons that his involvement was subject to further investigation. Simmons' unsolicited comment in an elevator when he was being brought to another location with the codefendants (all of whom were in custody) was clearly a spontaneous, volunteered utterance and was not the product of custodial interrogation.

Although we thus need not decide whether *State v. Hartley*, *supra* (103 *N.J.* 252), applies retroactively if this is a direct appeal in view of our conclusions, we emphasize that this appeal was granted on a "now for then" basis. A rule of retroactivity of later judicial opinions which would include cases such as this where a direct appeal was not taken for many years, with intervening applications which sought post-conviction relief and habeas corpus relief, might result in encouraging non-timely filing of direct appeals in cases where substantial terms of incarceration were imposed, so as to get the benefit of possible subsequent favorable rulings by future appellate courts.

State v. Lark, 117 *N.J.* 331 (1989) most recently discussed retroactivity in dealing with whether to apply *State v. Howard*, 110 *N.J.* 113 (1988), retroactively. *Lark* held that *Howard* would not be applied to convictions in which appeals were finally adjudicated prior to that decision. Hence, in those cases the failure of a trial judge to inform a defendant of the parole consequences of a sentence to the Adult Diagnostic and Treatment Center would not be a basis for a withdrawal of a plea or resentencing. The Court did note in *Lark*:

> To the extent that retroactivity issues arise in the context of criminal-procedure decisions implicating rights guaranteed under the federal constitution, United States Supreme Court precedents control the scope of retroactivity. *See State v. Stever*, 107 *N.J.* 543, 550-52 (1987) (acknowledging that under *Griffith v. Kentucky*, 479 *U.S.* 314, 107 *S.Ct.* 708, 93 *L.Ed.*2d 649 (1987), new constitutional rules of criminal procedure apply retroactively to cases pending on *direct review*, whether or not rule constitutes "clear break" with the past). [117 *N.J.* at 335 (emphasis supplied)].

Lark noted that in *Teague v. Lane*, 489 *U.S.* 933, _, 109 *S.Ct.* 1060, 1069, 103 *L.Ed.*2d 334, 349, reh'g den. __ *U.S.* __ 109 *S.Ct.* 1771, 104 *L.Ed.*2d 206 (1989), the United States Supreme Court had refused to consider on a collateral review whether the Sixth Amendment's fair-cross-section requirement applies to the actual petit jury chosen, rather than being limited to only the jury venire, as held in *Taylor v. Louisiana*, 419 *U.S.* 522, 95 *S.Ct.* 692, 42 *L.Ed.*2d 690 (1975). The *Lark* Court stated:

> In declining to decide the sixth-amendment issue because its disposition would not apply to defendant, the plurality opinion referred to Justice Harlan's view that it is
>
> > 'sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.' [*Id.* __

> *U.S.* at ____ 109 S.Ct. at 1073, 103 L.Ed.2d at 353 (quoting *Mackey v. United States*, 401 *U.S.* 667, 689, 91 *S.Ct.* 1160, 1178, 28 *L.Ed.*2d 404, 418 (1971) (separate opinion of Harlan, J.))].

The Court also referred to Justice Harlan's observation that

> 'the threat of habeas serves as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles. In order to perform this deterrence function, the habeas court need only apply the constitutional standards that prevail at the time the original proceedings took place.' [*Id. U.S.* at ___, 109 *S.Ct.* at 1073, 103 *L.Ed.*2d at 353 (quoting *Desist v. United States*, 394 *U.S.* 244, 262-63, 89 *S.Ct.* 1030, 1040-41, 22 *L.Ed.*2d 248, 263-64 (1969) (Harlan, J., dissenting))]. [*State v. Lark*, *supra* (117 *N.J.* at 342)].

The Court also noted that adopting Justice Harlan's view of retroactivity for cases on collateral review, the plurality opinion in Teague held, subject to two exceptions, that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final

before the new rules are announced."[14] *Teague*, *supra* (103 *L.Ed.*2d at 356).

The *Lark* Court concluded by stating:

> Although the analogy between federal habeas proceedings and our post-conviction-relief proceedings is imperfect, there is sufficient similarity to support our conclusion in this case that *Howard* does not apply to convictions in which appeals were finally adjudicated prior to that decision. In the context of this case, we are persuaded that the interest of finality, which is an essential element of our criminal justice system, outweighs any benefit that would be realized by application of *Howard* to convictions affirmed on appeal prior to its announcement. [*State v. Lark*, *supra* (117 *N.J.* at 343)].

Teague v. Lane, *supra* (489 *U.S.* 933, 109 *S.Ct.* 1060, 103 *L.Ed.*2d 334), also relied on Justice Harlan's separate opinion in *Mackey v. United States*, 401 *U.S.* 667, 91 *S.Ct.* 1160, 28 *L.Ed.*2d 404 (1971), in concluding that the second exception – only applying a new rule retroactively if it requires the observance of "those procedures that ... are

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[14]According to *Teague*, a new rule of law should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe. A new rule will also be applied retroactively if it requires the observance of "those procedures that ... are implicit in the concept of ordered liberty."

implicit in concept of ordered liberty" – applies only to watershed rules of criminal procedure:

> Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction. For example, such, in my view is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime. [*Teague v. Lane*, *supra* (485 *U.S.* at ___, 109 *S.Ct.* at ___, 103 *L.Ed.* at 356-357 quoting *Mackey v. United States*, *supra* (401 *U.S.* at 693-694, 91 *S.Ct.* at 1160, 28 *L.Ed.*2d at 404)].

It is also clear that *habeas corpus* relief is purely collateral and not meant as a substitute for appeal. The appellate route from the state court is to the United States Supreme Court. Lower federal courts do not have appellate review over state court decisions and their decisions are generally not binding precedent on the state courts. See, *e.g.*, *State v. Norflett*, 67 *N.J.* 268, 286 (1975); *State v. Coleman*, 46 *N.J.* 16, 36 (1965) *cert.* den. 383 *U.S.* 950, 86 *S.Ct.* 1210, 16 *L.Ed.*2d 212 (1966). See also *Allen v. Hardy*,

478 *U.S.* 255, 106 *Sup.Ct.* 2878, 92 *L.Ed.*2d 199 (1986); *Batson v. Kentucky*, 476 *U.S.* 79, 106 *S.Ct.* 1712, 90 *L.Ed.*2d 69 (1986); *Teague v. Lane*, *supra*, with respect to the retroactivity of the claim insofar as it may raise a federal issue.

We thus reject defendant's *Miranda* arguments.

II

Simmons contends that he was deprived of his rights to have a meaningful appeal based on the fact that stenographic tapes of the jury voir dire were apparently inadvertently lost or destroyed. He argues that this violated his due process rights. Due to what Simmons claims to be the insufficiency of the record he contends that he is effectively precluded from arguing meritorious points of appeal with respect to (1) the issue of pretrial publicity; and (2) whether the prosecutor used peremptory challenges to improperly exclude blacks from the jury., In the latter argument he relies on *State v. Gilmore*, 103 *N.J.* 508 (1986). His argument with respect to *State v. Gilmore* must of necessity fail because we consider this to be attempting a retroactive application of *Gilmore* under the procedural history and circumstances of this case. *Gilmore* and *State v. Watkins*, 114 *N.J.* 259 (1989) foreclose this issue on this "now for then" appeal.

The lost or destroyed stenographic tapes in connection with this trial included eight days of pretrial motions and in-camera *voir dire* of prospective jurors.[15] Also

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[15]The eight days were October 11 through 14 and October 17 through 20, 1977.

missing was the October 26, 1977 trial testimony of one of the State's witnesses, a Sergeant James Edwards of the Paterson Police Department; a December 8, 1977 defense motion to interview the jurors who had deliberated; and the December 21, 1977 sentencing proceedings. Hearings were held to reconstruct the record of the days for which stenographic tapes were unavailable. Hearings were held before the two judges[16] who were involved in the trial of this case. At the reconstruction hearings the State called Bruno Mongiardo, the assistant prosecutor who conducted the trial, and Adolph Galluccio, the designated attorney of the Public Defender's Office who defended Simmons at the trial. Each judge involved in the trial proceedings filed a statement certifying and settling the record as to those aspects of the trial events held before him in 1977 for which stenographic tapes were unavailable. Simmons filed no objections with either judge as to the substance of the reconstruction, and was given ample opportunity to supplement the record of these trial proceedings at the reconstruction hearings. All trial notes of the attorneys involved were reviewed, along with the court clerk's minutes of the trial proceedings. Verbatim transcripts of the reconstruction hearings were prepared and made part of the record, along with all exhibits introduced at those hearings.

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[16]Transcripts of "opening and closing statements to the jury or voir dire examinations" are not routinely included in the record of an appeal. See *R.* 2:5-3(b).

As noted, the initial trial judge had to be hospitalized after the jury was selected. A different judge then conducted the trial and the sentencing proceedings. Separate reconstruction hearings were held before each judge. See note 6, supra.

Assistant prosecutor Mongiardo testified during the reconstruction hearing that he could not find certain of his notes from the trial. Mongiardo said that he could not recall the number of jurors interviewed or their race or color, but did remember that the judge conducted an individual jury *voir dire* in chambers which took approximately nine days. Although Mongiardo did not recall the number of peremptory challenges he used on black potential jurors he testified that there were two areas of concern at the time of trial. The first was pretrial publicity since the guilty verdict in the trial of codefendant Phillips, who was tried separately, was returned only two weeks prior to the commencement of jury selection in this case. The second concern was the racial aspects of the case since there was a white victim and a black defendant. Mongiardo noted that after *voir dire* of each juror, the judge permitted both attorneys to supplement the jury questioning. Mongiardo could not recall the racial composition of the impanelled jury, except that juror No. 2 was a black male and juror No. 6 was a white female. He could not recall any of the defendant's motions of October 11, 12, 13, 14, 17, 19, or 20th, as indicated by the court clerk's minutes. Nor did he recall the defense ever making a motion for a mistrial on the ground that the State had sought to systematically exclude black jurors.

Defense counsel Galluccio similarly had a vague recollection of jury selection, but could remember that it was extensive and conducted in chambers. Galluccio stated that he had a vague recollection of making a motion concerning the fact that the verdict reached in *State v. Phillips* was only reached a couple of weeks prior to the jury selection in Simmons. He further testified that he could not recall making a motion for a mistrial on the basis that the State was improperly excluding blacks, but stated

that "I probably did, but I can't say that." He further stated that he had made a similar motion based upon systematic exclusion of blacks by the State in several other cases during the same period of time as the Simmons trial. Finally, Galluccio testified that he could not recall the number of blacks in the jury pool, the number of blacks struck by the prosecutor or the number of blacks finally ending up on the jury. Galluccio's hand written notes make no mention of a defense motion for mistrial on the grounds of an impermissible exercise of the prosecutor's peremptory challenges on the basis of a presumed group bias.[17]

The court clerk's minutes were introduced at the the reconstruction hearing. They indicate that the defense attorney made numerous motions during the *voir dire*. On October 11, 1977, the judge denied defense applications: concerning discovery of a conversation between David Wilson and the prosecutor; for an adjournment; to sequester the jury. On October 12, 1977 the clerk's notes indicate that *voir dire* commenced *in camera*. On October 13, defense counsel made a motion for a mistrial or, in the alternative a foreign jury. After the court heard legal arguments it denied the motion. Defense counsel also addressed the court regarding preserving the right to appeal if he did not use all his peremptory challenges. *Voir dire* continued. On October 14, the minutes reflected that Galluccio made a motion for a mistrial. After the court heard legal argument it denied the motion and *voir dire*

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[17]We again note in passing the continuing criticism and problems that have arisen regarding peremptory challenges. See *State v. Pemberthy*, 224 *N.J. Super.* 280, 292-294 (App. Div. 1988), certif. den. 111 *N.J.* 633 (1988).

continued *in camera*. On October 17 defense counsel made an application for information regarding the verdict of a jury on which a prospective juror sat. This motion was denied and *voir dire* continued. On October 18, *voir dire* continued. On October 19, the minutes reflect that defendant's motion for mistrial was denied by the court. *Voir dire* continued. On October 20, 1977 the minutes reflect that defendant moved for a mistrial. After the court heard legal argument, it reserved decision on the motion.

At the end of the testimony at a reconstruction hearing, Judge Leopizzi, who presided over the jury selection, issued a certified statement:

> As to the jury selection of October 12, 1977, after consideration and review of the statement of proceedings and appendices submitted by plaintiff-respondent (S-1 in evidence), regarding the substance of the jury selection in the case on pages 3 to 4, and Pal and Pa2, which was based upon the Court Clerk's Minutes and independent recollection of the trial prosecutor and the trial notes and documents contained in my file; review of the testimony of the witnesses, Bruno Mongiardo and Adolph Galluccio, at the reconstruction hearing of September 21, 1977; review of the transcript of the September 29, 1988 supplemental reconstruction hearing and review of the September 29, 1988 supplemental reconstruction hearing and review of my trial notes and documents together with my own recollection of the jury selection in this matter, I hereby certify the following

recitation of the substance of the jury selection proceedings of October 12, 1977 to October 20, 1977 to be an accurate and complete statement of the proceedings held in this court, and hereby incorporate herein all exhibits introduced into evidence during the September 21, 1988 and September 29, 1988 reconstruction hearings as well as the transcripts of these reconstruction proceedings before this court.

The jury selection in this case ... follows essentially the same procedure as that undertaken in the *Phillips* case, which was the trial of the codefendant which ended two weeks prior to the commencement of the jury selection in Simmons. For this reason, and due to the fact that the victim in this case, a Paterson physician, was popular in the community, there was concern as to any potential pretrial publicity problem. There was concern raised by defense counsel as to any potential pretrial publicity problem. There was concern raised by defense counsel as to any potential racial prejudice or bias held by potential jurors in this case, as the victim in this case was white and defendant Simmons is black. In addition, there were concerns such as whether potential jurors knew or were patients of the victim and whether potential jurors were familiar with the crime area. Therefore, an individual juror *voir dire* was conducted in my chambers, during which I questioned each potential juror as per my typewritten 3 page

list of general questions. Defense counsel also submitted a handwritten list of 19 questions for this Court's consideration to be asked of potential jurors. Counsel were also given the opportunity to ask further questions of each potential juror. After such questioning, the juror was sent back into the courtroom while counsel discussed possible problems arising from the responses received and possible further areas of questioning of the juror.

* * *

During the September 21, 1988 reconstruction hearing, appellate defense counsel's examination of the witnesses focused upon the area of the State's exercise of peremptory challenges upon potential black jurors, due to the notation found in the file notes of the Honorable William J. Marchese, J.S.C. (Pa-2 of Appendix to Statement of Proceedings submitted by Plaintiff-Respondent, S-1 in Evidence). Although Judge Marchese was not personally involved in the jury selection in this case, his file notes state on page 2: '(6) Defense motion for mistrial charging State with systematically excluding Blacks from jury. Leopizzi denied.' The Court Clerk's Minutes (D-1 in Evidence), although indicating that defense counsel made numerous motions during jury selections, do not reflect the basis for any of these motions. My own notes and files regarding the jury selection in this case (S-4 in Evidence) do not contain any reference to any such defense motion during this 1977 jury selection.

Judge Leopizzi then continued, stating:

> Subsequent to the September 21, 1988 reconstruction hearing, appellate defense counsel advised the court that his further investigation of the defense trial file in connection with this case disclosed certain trial notes of defense counsel, 1977 lists of jury panel members, and copies of newspaper articles. Upon receipt of this information, I scheduled a supplemental hearing date for September 29, 1988 to supplement the reconstruction record as to what had transpired and supplement the record with any additional information that was uncovered. At this September 29, 1988 supplemental hearing, the above-mentioned trial notes of defense counsel, 1977 jury panel lists, newspaper articles and cover letters by appellate defense counsel, were marked S-5 and S-6 in evidence, and the handwritten notes of the trial prosecutor were marked S-8 in evidence. William J. Rohr, Deputy Public Defender, Passaic County Public Defender's Office, testified that all trial files in connection with this case were searched and physically brought to this supplemental hearing. Upon examination, all parties indicated their complete satisfaction that all files, notes of defense counsel at trial and documents which exist in connection with the pretrial conference, jury selection and suppression hearing in the case before his court have been found. Examination of these materials disclose no further evidence pertaining to the

> racial composition of the deliberating jury, any peremptory challenges exercised by either party during jury selection which pertained to the race of the excused potential jurors, the racial composition of the jurors excused by this court for cause, or the existence of any defense motion for mistrial on the ground that the State systematically excluded black jurors.

The New Jersey Court Rules specifically allow for reconstruction of the trial record. See *R.* 2:5-3(f). In commenting on this rule, Judge Pressler explained:

> While this rule as originally adopted did not expressly provide for a 'reconstruction' hearing the trial court clearly had the inherent power to settle the record in that manner .... The rule, however, was amended effective January, 1986 expressly to provide for reconstruction of a lost, destroyed or unavailable record under the supervision of the court or agency from whom the appeal is taken and to further provide for reconstruction in the form of a statement in lieu of transcript.

Pressler, *Current N.J. Court Rules*, Comment *R.* 2:5-3(e). See also *R.* 2:5-5 and comment.

This rule codified the procedures which courts were already implementing to rectify the problems involved with appeals where stenographic notes or transcripts were lost or destroyed in whole or in part. *See e.g., State v. Gaines*, 147 *N.J.Super.* 84 (App. Div. 1975), aff'd. sub nom; *State v. Powers*, 72 *N.J.* 346 (1977); *State v. Kozasski*, 143 *N.J.Super.* 12 (App. Div. 1976) certif. den. 71 *N.J.* 532 (1976); *State v.*

Smith, 84 *N.J.Super.* 452 (App. Div. 1964), certif. den. 43 *N.J.* 270 (1964).

The reconstruction hearings indicate the court took great pains in *voir dire* to ensure a proper jury selection process. Moreover, as we have observed, *Gilmore* specifically limited retroactivity and noted:

> Thus, we affirm the Appellate Division holding that the new rule will apply to this defendant, trials in which the jury selection commenced on or after the date of the Appellate Division opinion, and cases now on appeal in which the issue was preserved in the trial court and the record is adequate to raise the issue. [*State v. Gilmore*, *supra*, (103 *N.J.* at 544) (footnote omitted)].

As a threshold requirement the defendant "must timely object to the prosecution's use of peremptory challenges during or at the end of the jury selection, but before the petit jury is sworn." *Id.* at 535.

III

Defendant contends that the State's conduct throughout the history of this case should shock the judicial conscience and militate towards a reversal, relying on *State v. Sugar*, 100 *N.J.* 214 (1985) and Judge Debevoise's opinion in *Simmons v. Beyer, supra* (689 *F.Supp.* 432). He asserts that the State opposed his efforts to obtain transcripts prior to the destruction of certain of the stenographic tapes and thus should not profit from the loss.

The State, however, had every right to oppose Simmons' applications for post-conviction relief and habeas corpus relief on the ground that State remedies had not been exhausted. It had consistently pointed to the state court appeal route. Moreover, as noted previously, the State did not oppose Simmons' belated application for leave to appeal and subsequent motion for reconsideration, or indeed the petition for certification to the Supreme Court. It was not until after denial of those applications that the State understandably took the position that once the appellate courts had ruled the matter had been disposed of, and was thus final, so that transcripts were then not necessary. As we view it, any deficiency in obtaining transcripts was attributable to either Simmons, his designated trial counsel, or the Public Defender's Office, or a combination thereof, as an examination of the history of this matter reveals. Nothing supports defendant's bare contention that the State tried to obstruct his exercise of any constitutional rights. The facts belie that argument.

In August 1983, when Simmons first sought leave to appeal *nunc pro tunc*, more than five and one-half years after he was sentenced, the State took no position on his request. The same applied on October 12, 1983 when a reconsideration motion was filed. Simmons then sought, through assigned counsel, an extension of time to file his petition for certification to the New Jersey Supreme Court. At that point the State did point out that Simmons had failed in his papers to indicate how long an extension of time was requested. It also observed that "in view of the age of this matter, the State will not consent to this motion." The refusal of the State to consent to a motion is not malicious or improper opposition. In any event, the State was not required to consent to any motion. These actions by the State can hardly be characterized as obstructionist or

antagonistic, particularly in light of the fact that the Supreme Court ultimately granted the request for an extension of time.

IV

Simmons' contention that the delay in furnishing the transcripts violated his due process rights to a speedy appeal is meritless. There is no such requirement for a speedy appeal, particularly under the circumstances here where it was not the fault of the State and, as we have noted, much of the delay was caused by Simmons and attorneys in the Public Defender's Office. In addition, there was an adequate explanation for the loss of, and difficulty in finding, the stenographic tapes years after the trial. As it turned out, most of those tapes were found. As the tapes were located they were transcribed and made available to Simmons and the State. Except as previously noted, we have essentially all of the transcripts of the trial proceedings and related motions. There are also transcripts of all the subsequent post-judgment motions.

V

Simmons argues that the jury's verdict was contrary to the evidence and violated his constitutional rights. We note initially that Simmons failed to move for a new trial on these grounds. See *R.* 2 :10-1. Hence, this issue is technically not cognizable on appeal since a motion for a new trial on that ground was not made in the trial court. In any event, we have considered the issue on the merits and conclude that the verdict was clearly supported by sufficient credible evidence in the record and there was no error which had the capacity to lead to an unjust verdict. *State v. Macon*, 57 *N.J.* 325, 335-336 (1971). It was within the province of the jury to decide credibility. It obviously disbelieved Simmons and

believed the testimony of Wilson, notwithstanding the fact that his credibility was attacked at the trial. The jury was aware that Wilson had entered into an immunity agreement with the State in order to avoid prosecution for the offense. As was stated in *State v. Dunphy*, 24 *N.J.* 10, 17 (1957):

> As in all such cases, the witnesses for the State are rarely citizens of high repute in their particular community. Whether they are to be believed or not is left for decision of the jury consisting of the defendants peers; it is not within the power of an appellate tribunal to substitute its judgment in this area for that of the jury. The power of an appellate tribunal to review the findings of a jury is subject to limitations. We may not interfere with the constitutional right of trial by jury by weighing the evidence and substituting our judgment for that of the jury; nor may we set aside a verdict merely because, in our opinion, we or the jury upon the same evidence might have found otherwise. As long as the verdict of the jury rests upon testimony competent to sustain an inference of guilt, such a finding is binding on this court and our review upon appeal is aimed only to correcting injustice resulting from obvious failure by the jury to perform its function. The error in the verdict must appear to us as an 'inescapable conclusion.' (Citation omitted).

Simmons raises an other issue not raised in the trial court. He argues that the photographs of him with codefendants Phillips and Wilson at police headquarters which appeared in the Saturday, May 28, 1977 edition of *The*

Paterson News irreparably prejudiced him by creating a substantial likelihood of misidentification. He also argues that the eight photograph array of young black males shown by Detective Nativo to witnesses contained only two photographs of men wearing braids and, therefore was misleading.

The second victim, Marshall, testified that he had seen the article and photographs and saw "two gentlemen in the picture that resemble the two that mugged me. There was three in the picture but two of them was the ones that actually got me." About two months after the robbery, Marshall was approached by Detective Nativo and the trial prosecutor and questioned about the incident. Marshall was given seven or eight photographs and asked if he could recognize any of the men. Marshall said that nothing was said to him about the persons in the photographs and when he asked if any of the men who robbed him were depicted, he said that the detective responded "Well, we can't tell you that." Marshall testified that he looked through the array and picked out two photographs, one of codefendant Phillips and one of defendant Simmons. The testimony was clear that at no time was Marshall told that he had to pick out any of the photographs.

After Marshall was shown the photographic array, Nativo showed him the newspaper depicting the three codefendants and asked if he recognized anyone in the picture. Marshall testified that the detectives did not tell him anything about the newspaper, its photographs or that he had to pick someone out of the picture. Marshall recognized Simmons and Phillips in the photograph.

At the conclusion of this testimony at the October 21, 1977 *Wade* hearing defense counsel conceded that the out-of-

court photographic identifications of Simmons were not impermissibly suggestive. However, he argued that all the witnesses' identifications should be excluded. The judge ruled that the identifications were admissible, subject to cross-examination as to their weight and credibility. As to suggestiveness the judge said:

> Well, in chronological order, first of all, Mr. Galluccio has, I would say, conceded to the court, and I certainly agree, that from the testimony we have had, the identification made at this point, insofar as the *Wade* hearing is concerned in attacking any impermissible suggestibility by the police officers in assisting in that photographic identification, is absent.
>
> I would find, from what I have heard of this testimony, there has been no impermissible suggestibility. The identification is made. It is not a firm identification, it is an identification made by a man who says it looks like that man. It is a photograph of a man who looks like a man who robbed him. At that point, I think we are involved with an issue of the weight of that testimony.

Under the circumstances, we conclude that the record does not indicate that there was any substantial likelihood of misidentification. *State v. Madison*, 109 *N.J.* 223, 232-233 (1988); *State v. Farro*, 61 *N.J.* 434, 447-448 (1972), *cert.* den. 410 *U.S.* 937, 93 *S.Ct.* 1396, 35 *L.Ed.*2d 602 (1973). The trial judge properly found that the identification procedures were not impermissibly suggestive. Likewise, the

identification made by Bagby and Garcia were not impermissibly suggestive.

VI

Simmons raises various arguments that he was denied due process rights and a fair and impartial jury. At the end of the trial, Mildred Kelnhofer, one of the jurors, wrote letters to defense counsel, the court and the assistant prosecutor. Her letter to defense attorney Galluccio read in pertinent part:

> Thought that you might be interested to know that most of us felt positive about your cross-examination and probably would have presented a verdict in favor of Lawrence Simmons. However -- it was the defense that was a big let down and disappointed us. The fact that there were so few witnesses for Mr. Simmons -- i.e. -- Mother, sister -- persons at the pool hall, etc. was a major factor in the decision. We had the feeling a surprise witness would appear. The jury felt the defense and lack of witnesses was because of Lawrence's guilt.
>
> You may be interested to know that the original count was seven guilty and five not guilty. I was one of the last holdouts. I truly searched my mind, conscience and evidence for that reasonable doubt of which there were many. In all honesty I must say that after rehearing the lengthy testimony especially that of the arresting officer, who said 'sirens were not on' and Larry (as we came to call him)

had said that they were on, plus his remarks at the police station that I too [indecipherable] other was 90% convinced that the remaining jurors were correct in their vote.

I hope we made the right decision.

In your summation you mentioned an unemotional defendant. Yes, we felt that way also perhaps it was fright or acceptance of guilt? The two times that I saw Mrs. Simmons in the court room, she appeared to react the same. Could it be that it is their specific personality trait? More of his family in attendance also would have won him some favor.

She wrote in another letter to Assistant Prosecutor Mongiardo:

We the jury found it a difficult decision to make. The first vote was seven guilty and five not guilty. Rehearing the lengthy transcripts helped us to decide. We hope we did not make the wrong decision. I, as a lay person commend you on the prosecution, although I had some doubts about some state evidence.

Simmons argues that these letters support his position that the proofs in the case are close, and support his argument that the verdict was against the weight of the evidence, and that any errors cannot be considered harmless. He also asserts that these letters undercut any suggestion by

the State that the evidence of his guilt was overwhelming. He further argues that the letters indicate that this juror changed her vote to guilty due to Simmons' remark at the police station, and thus his *Miranda* rights violation argument cannot be considered harmless error. Simmons also focuses on the juror's remark that Simmons and his mother appeared "unemotional" and the statement "Could it be that it is their specific personality trait?" as having racial overtones and bearing on his *Gilmore* argument. Simmons also argues that in her letter this juror specifically stated that she was in part convinced Simmons was guilty because he stated that the police car that arrested him had its siren on while the arresting officer testified that the siren was not on. We note in passing that an examination of the transcripts reveals that while Officer Micks testified that he did not have his siren on as he approached Simmons, Officer Haban, an officer in another vehicle, testified that he had his siren on.

On December 1, 1977 defense counsel moved for an order permitting examination of the 12 deliberating jurors regarding the verdict and their deliberations. This motion was properly denied. In *State v. LaFera*, 42 *N.J.* 97, 106-107 (1964), the late Chief Justice Weintraub stated:

> A jury deliberates in secrecy to encourage each juror to state his thoughts, good or bad, so that they may be talked out. 'Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.' *Clark v. United States*, 289 *U.S.* 1, 13, 53 *S.Ct.* 465, 77 *L.Ed.2d* 993, 999 (1932) ....

> For the jurors' individual protection, the law raises a privilege against disclosure of his communications during deliberations, a privilege which will yield only to some greater public need. (Citations omitted). It is true that no settled rule bars extrajudicial, post-trial disclosures by a juror of his own views even though in cases of public interest the trial judge not infrequently cautions against such disclosures. Yet one of 12 may not be able to disclose his own part without revealing something the other jurors are entitled to have protected. Moreover the public too has a stake in the promise of secrecy to ensure free debate in cases to come. In these circumstances it is appropriate to protect all the jurors against efforts of others to browse among their thoughts in search of something to invalidate their verdict. This R.R. 1:25A [the predecessor source rule to R. 1:16-11 seeks to do.

See also *State v. Athorn*, 46 *N.J.* 247, 251 (1966), *cert.* den. 384 *U.S.* 962, 86 *S.Ct.* 1589, 16 *L.Ed.*2d 674 (1966).

Examination of a jury after trial is permitted only if the court is satisfied that "good cause exists." *R.* 1:16-1. The good cause requirement does not include "the motives or methods or processes by which [the jurors] reached the verdict..." *State v. Kociolek*, 20 *N.J.* 92, 100 (1955). The good cause required to interview a juror after a verdict "must be predicated upon the injection into the deliberation of some outside influence or event or proof a juror was tainted." *State v. Jasuilewicz*, 205 *N.J.Super.* 558, 569 (App. Div. 1985), certif. den. 103 *N.J.* 467 (1986). Proof of juror bias might

be sufficient to allow such inquiry. See *State v. Young*, 181 *N.J. Super.* 463, 471 (App. Div. 1981), certif. den. 91 *N.J.* 222 (1982). However, no such showing has been made here. Indeed, in denying the motion the trial judge said:

> This court finds that there is insufficient reason to invade the privacy of the jury deliberations in this case because of the subject letter written by the one juror. It agrees with the State that to inquire into the deliberations of the jury is an extraordinary remedy, and should be invoked only after a showing of misconduct or such circumstances that could have tainted the verdict of the jury. Rule 1:16-1 provides for inquiry upon 'good cause shown.'
>
> As pointed out in *State v. Kociolek*, 20 *N.J.* 92 (1955), the 'good cause' intended by the rule is not impropriety or defect in the motives or methods or thought processes by which the jurors reach their verdict, but rather it is some event or occurrence injected into the deliberations in which the capacity for prejudice inheres. In the many cases involving the applicability of this rule, the courts have sought to limit such inquiry into a particular juror's thinking, or the deliberations of the entire jury, to matters wherein the deliberations have been effected [*sic*] by misconduct of a member of the jury or of outsiders in communication to that jury. They refer to matters that are not evidence in the case, or which were not present in the court room during the trial, and more particularly to

> matters which would be likely to have brought about an unjust verdict by reason of prejudice resulting from that misconduct. In fact, the rule is intended to protect and insulate the jurors from interrogation into their methods or thought processes during deliberation, unless that good cause has been shown.

We agree with the judge's determinations and reject Simmons' argument.

VII

Simmons next argues that the judge erred in charging the jury by not giving a more thorough instruction on identification, by improperly instructing the jury with respect to Wilson's immunity and by improperly instructing the jury that defendant Simmons had, at age 16, been tried as an adult.

With respect to the identification issue our review of the transcript reveals that the trial judge scrupulously related that no in-court identification had occurred and spoke repeatedly as to the tentative nature of each witness's newspaper photograph and array identifications. The judge had actually charged on identification in a manner which comported with the criteria confirmed in *State v. Green*, 86 *N.J.* 281 (1981), decided four years after the trial. Hence, we reject defendant's contention as meritless.

In addition, Simmons argues that the judge should not have instructed the jury that Wilson was not immune from prosecution because Wilson believed he had immunity from prosecution. The judge properly instructed the jury that the immunity only applied to the use of his testimony against

him in a criminal proceeding and that the State was not precluded from prosecuting him on other evidence. What Wilson may have believed with respect to his being prosecuted for the crime is irrelevant. The judge properly instructed the jury concerning the situation and the applicable law. *State v. Gelb*, 212 *N.J.Super.* 582, 588-589 (App. Div. 1986), certif. den. 107 *N.J.* 633 (1987); *State v. McNair*, 59 *N.J.Super.* 453, 459 (App. Div. 1960), *cert.* den. 365 *U.S.* 829, 81 *S.Ct.* 715, 5 *L.Ed.*2d 706 (1961).

Simmons' also contends it was error to instruct the jury that, although he was 16 years of age when he was convicted of two crimes, he had been indicted, tried and convicted at that time as an adult. The judge made it clear that the convictions could only be used to impeach Simmons' credibility and were not to be considered as evidence of guilt. Use of a prior criminal conviction of a juvenile who has been tried as an adult is permitted under these circumstances. See *State v. Steffanelli*, 133 *N.J. Super.* 512 (App. Div. 1975); *United States ex rel Herring v. Fenton*, 531 *F.Supp.* 937, 940 (D.N.J. 1981). We find no error.

VIII

Simmons contends that it was error for the trial judge to preclude defense counsel from eliciting the names of the individuals named in a June 8, 1977 anonymous telephone call to the Paterson police to the effect that two of the men arrested are "right" and the other two who are involved were individuals named Doumet Shell and Danny Wells. A brief criminal investigation had shown that one of these individuals had a criminal record. While the prosecutor had objected to the admission of this information under *Evid. R.* 4 on the ground that it would confuse the issues in the case, the trial judge had allowed its limited admission, noting that the sole

reason for the admission was not for the truth of the matter, but to show whether the police took action with respect to the anonymous call, defense counsel's purpose being to attack the "credibility of the police officers in that they had not completed the job." Simmons now argues that the judge erred in so limiting defense counsel.

We note that at the trial defense counsel specifically maintained he had no interest in ascertaining the names of the two individuals, but was only interested in trying to present the sloppy work of the police. Hence, defendant's argument on this appeal is essentially a challenge to what was a matter of trial strategy. *State v. Harper*, 128 *N.J.Super.* 270, 276-278 (App. Div. 1974), certif. den. 65 *N.J.* 574 (1974). Moreover, there has been no showing of how the exclusion of these names unduly prejudiced his case. The judge's ruling was within the ambit of his discretion. *State v. Carter*, 91 N.J. 86 (1982); *State v. Sands*, 76 *N.J.* 127, 144 (1978). We find no mistaken exercise of discretion. *State v. Rogers*, 19 *N.J.* 218, 229 (1955).

Simmons argues that the aggregate effect of these various trial errors, and also the denial of a change of venue or a foreign jury and the granting of the State's motion to consolidate the two indictments for trial, denied him his constitutional right to a fair trial. See *State v. Orrechio*, 16 *N.J.* 125 (1954). We have considered all of defendant's contentions of error and conclude that they are without merit. *R.* 2:11-3(e)(2). Any errors that existed were harmless beyond a reasonable doubt. Simmons was entitled to a fair trial, which he received, not a perfect one. *Brown v. U.S.*, 411 *U.S.* 223, 231-232, 93 *S.Ct.* 1565, 1570, 36 *L.Ed.*2d 208, 215 (1973);, *State v. Biddle*, 150 *N.J.Super.* 180, 183 (App. Div. 1977), certif. den. 75 N.J. 542 (1977); *State v. Boiardo*, 111 *N.J.Super.* 219, 233 (App. Div. 1970), certif. den. 57

N.J. 130 (1970), *cert.* den. 401 *U.S.* 948, 91 *S.Ct.* 931, 28 *L.Ed.*2d 231 (1971). Incidental errors are perhaps inevitable in any trial proceeding and do not suffice to warrant a reversal of a conviction. *State v. Orrechio, supra* (16 *N.J.* at 129).

IX

Simmons also argues that the trial judge who heard and denied his 1989 post-conviction motion for a new trial based on the relatively recent recantation of testimony by Wilson erroneously denied his application.

On February 9, 1989 we granted Simmons' motion, during the pendency of this appeal and before briefs were filed, for a limited remand in order to allow him to move in the trial court for a new trial on the ground of newly discovered evidence based on the claimed recantation by codefendant Wilson of his 1977 trial testimony. Apparently, Wilson, while in the Passaic County Jail in Paterson, signed a hand printed note, dated August 9, 1985 to the effect that from the beginning he was "told to lie" and did in fact lie in the Simmons case. Subsequently, in an April 21, 1987 certification, while Wilson was in state prison in Trenton, he repeated that claim.[18] Thereafter, in affidavits or

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[18]A copy of the document in the defendant's appendix is unsigned by Wilson and purports to have a signature by a notary public but we cannot read the name and see no notary seal or stamp. There are subsequent statements in various formats contained in defendant's appendix, some signed by Wilson, others not signed, iterating Wilson's allegation that the testimony he gave previously was not true. Judge Marchese concluded, after a remand hearing, that Wilson's testimony was totally unbelievable and fabricated.

certifications dated July 24, 1987, July 7, 1988 and March 4, 1988, Wilson again, in various versions, attempted to repudiate his trial testimony.

As noted, Wilson testified as a State's witness under a grant of immunity. Although Wilson was ultimately released and the murder indictment dismissed as to him, it appeared that he was continually involved with the criminal justice system. Following Simmons' 1977 conviction, codefendant Wilson was involved, each year from 1978 through 1984, with various arrests and convictions, primarily for theft offenses and was sentenced to various probationary periods and jail terms. In 1985 Wilson was arrested and convicted of first degree robbery, possession of a weapon for an unlawful purpose, three counts of burglary, theft and attempted theft. On the State's motion for an extended term Wilson was sentenced to an aggregate term of 60 years in State prison, 30 years without parole eligibility.[19] While Wilson was in the Passaic County Jail awaiting transfer to the State prison system (where Simmons was also incarcerated), Wilson wrote a recanting letter to the Attorney General on August 9, 1985, some three and one-half weeks after he was sentenced to an extended term and over nine years after the murder of Dr. David Doktor. Wilson wrote in that letter that he was unable to read in 1977, that he was told to lie in his testimony during the Simmons case, and that detectives, investigators and the prosecutor told him what to say and threatened him if he did not testify as to what they said.

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[19]This sentence was subsequently modified by the Appellate Division in November 1988, when the sentence was reduced to 30 years, 10 without parole eligibility. But Wilson still had a significant prison term to serve.

At the remand hearing Judge Marchese pointed out the inconsistencies in finding that this was a relatively recent fabrication of a claim by Wilson, that his trial testimony was false and that he had no reason to lie now. The judge pointed out that his conscience did not become a problem until he was confronted with the probable confrontation with Simmons and Phillips in 1985 in the New Jersey State Prison in Trenton. The judge also pointed out that Wilson gave information about seven hours after the murder, and which was later confirmed, that nobody else knew except someone present at the scene of the murder. The judge concluded that Wilson's recantation was not the truth:

> It is fraught with inconsistencies and obvious lies. The stain of falsehood today is supported by the proof at this Hearing that he could read and write in 1977, and particularly the ability to read, which he now contends he was unable to do. He could read. He did read, and I refer to the Miranda warnings on the wall of headquarters to the Hamburger note, the exemplars and his reading of the hamburger note to the jury. I conclude that he testified truthfully at the trial and did so in order to insure his immunity.

The judge found incredible Wilson's statement that detectives prepared his statement and forced him to sign it. The judge also pointed out that the recantation was not brought about by Wilson's guilty conscience, "but rather it occurred when he realized his sentence to Trenton meant a confrontation with Simmons and Phillips and that he would arrive there with a designation of an informer, a rat."

Defendant filed an amended notice of appeal to include in the appeal the order entered April 10, 1989 denying his motion for a new trial.

The trial judge's findings are amply supported in the record, *State v. Johnson*, 42 *N.J.* 146, 162 (1964). We reject Simmons' assertions that the trial judge erroneously found Wilson had lied at the recantation hearings. The trial judge appropriately applied the applicable standards in ruling on the motion. *State v. Carter*, 69 *N.J.* 420, 427-428 (1976). See also *State v. Smith*, 29 *N.J.* 561 (1959), *cert.* den. 361 *U.S.* 861, 80 *S.Ct.* 120, 4 *L.Ed.*2d 103 (1959). The judge concluded that Wilson's recantation testimony was "fraught with inconsistencies and obvious lies." Our review of the record makes it clear that the judge had ample basis to come to that conclusion.

X

Finally, we address Simmons' contention that his sentence is manifestly excessive and that there was error in failing to merge the conviction and in imposing a consecutive sentence. These sentences were imposed in accordance with the then applicable provisions of Title 2A. We merely note in passing that his sentence under the prior law is far less for murder than is now required. See *N.J.S.A.* 2C:11-3. Our review of the record in light of Simmons' contentions satisfies us that there was no mistaken exercise of sentencing discretion. *State v. Butler*, 89 *N.J.* 220, 232 (1982); *State v. Whitaker*, 79 *N.J.* 503 (1979). There was no basis for a merger. *State v. Best*, 70 *N.J.* 56 (1976); *State v. Davis*, 68 *N.J.* 69 (1975).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office

Emille R. Cox
Clerk

APPENDIX I

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 86-4274 (DRD)

LAWRENCE L. SIMMONS,
Petitioner,

vs.

HOWARD L. BEYER,
Superintendent, New Jersey
State Prison, Trenton, and
W. CARY EDWARDS, Attorney
General of New Jersey,
Respodents.

OPINION

DEBEVOISE, District Judge,

NATURE OF THE CASE

This is an action for a writ of habeas corpus brought by petitioner Lawrence L. Simmons against respondents, Howard L. Beyer, the Superintendent of the New Jersey State Prison in Trenton, and W. Cary Edwards, the

Attorney General of New Jersey. On July 5, 1988, a conditional writ of habeas corpus was granted by this court. Petitioner presently moves to challenge the sufficiency of the reconstructed portions of the trial record, requesting that this court find that the record as reconstructed is inadequate.

FACTS

The unusual facts of this case are set forth in my opinion of July 5, 1988. I will not repeat these facts except as necessary for resolving the instant motion. In my July 5th opinion, I granted a conditional writ of habeas corpus, allowing the respondents an opportunity to cure the due process and Sixth Amendment violations which deprived petitioner of a direct appeal in state court. That opinion required that the state provide petitioner with either an effective appeal to state appellate courts or a new trial. *Simmons*, 689 F.Supp. at 449. The state has decided to pursue the former of these alternatives which necessarily entails reconstructing the missing portions of the transcripts in this case.[1]

On August 30, 1988, the Superior Court of New Jersey, Appellate Division, granted petitioner's application

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[1]I noted that "[s]ince it is conceivable that the state may yet be able to find or reconstruct an adequate record to permit an appeal, I will give it an opportunity to do so...." *Simmons v. Beyer*, 689 F. 2d 432, 449 (D.N.J. 1988). My earlier opinion makes it clear, however, that if a new trial is not provided or if an adequate trial record is not presented for a timely processed state appeal, the petition for habeas corpus will be issued. *Id.*

for leave to appeal *nunc pro tunc* and remanded his case to the trial court for the limited purpose of reconstructing the missing portions of the record. The reconstruction of the record was completed and the certified record (including all documents and transcripts constituting its reconstructed portions) was filed with the Appellate Division on October 4, 1988. Respondents note that the Appellate Division Clerk's Office "has abstained from issuing a peremptory scheduling Order during the pendency of Petitioner's instant application" to this court. (Resp. brief at ii).

To this date, the state has found and prepared substantial portions of the original trial and pretrial transcripts in this matter which now exceed 1,400 pages. However, the original transcripts of certain portions of the trial court proceedings have not been found. The state has therefore submitted reconstructed records of the following proceedings: an October 11, 1977 pretrial conference; the jury selection and *voire dire* which took place over approximately nine days from October 12 to October 20, 1977; the testimony of Officer Dennis Micks of the Paterson Police Department, who testified at a hearing on a motion to supress evidence on October 20, 1988; the trial testimony of Sgt. James Edwards of the Paterson Police Department, who testified on October 26, 1977; the hearing on defendant's motion to interview jurors who sat on defendant's jury; and the sentencing proceedings of December 21, 1977.

Petitioner's counsel, focusing particularly on the nine days of jury *voire dire*, claims that the state has failed

adequately to reconstruct the record, preventing petitioner from effectively asserting his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986) and *State v. Gilmore*, 103 N.J. 508 (1986). Petitioner raises serious problems with the adequacy of the reconstructed record concerning the jury selection, the conduct of the state during the past eleven years during which time petitioner sought a direct appeal, and many other problems related to rights of due process which are outlined, in part, in my earlier opinion. This court, however, in the interest of comity, must defer in the first instance to the state courts for disposition of petitioner's claims. Once the state courts have had an opportunity to review petitioner's federal claims, they are subject to re-examination in a habeas corpus proceeding.

DISCUSSION

A habeas petitioner must first exhaust all available state procedures before litigating his claim in federal court. 28 U.S.C. sec. 2254(b) and (c); *Rose v. Lundy*, 455 U.S. 509 (1982). The strong policy of comity between state and federal courts requires this court to defer to the state court's process except where there is "extreme necessity" requiring immediate federal review, *United States ex rel. Patrick v. Russel*, 353 F. Supp. 1269 (E.D. Pa.), *aff'd*, 485 F. 2d 683 (3d Cir. 1973), *cert. denied*, 414 U.S. 1145 (1974), or where it would be futile to return to the state courts. 28 U.S.C. sec. 2254(b); *Gibson v. Scheidemantel*, 805 F.2d 135, 140-41 (3d Cir. 1986); *see also Mayberry v. Petsock*, 821 F.2d 179, 184-85 (3d Cir. 1987) (state obstruction of appellate process may excuse failure to exhaust state remedies).

It is true that until recently the state system was less than cooperative in proving petitioner with a direct appeal. *See Simmons*, 689 F. Supp. at 434-38 and 448-49. However, since petitioner received a conditional writ of habeas corpus the state has not only evinced its intent to expeditiously process petitioner's appeal, but, in fact, it has begun to do so. Thus, I cannot say at this juncture that this case presents circumstances of "extreme necessity" for federal adjudication, nor does it present circumstances which demonstrate that resort to state procedures would be futile.

To be sure, petitioner has pointed to significant problems concerning the adequacy of the reconstructed record concerning the jury selection in this case. Indeed, it appears that petitioner, who is proceeding on direct appeal, may be entitled to the rights expounded in *Gilmore*, *supra* and *Batson*, *supra*. If these rights apply, it is evident that many relevant pieces of the record concerning the nine days of jury selection are missing. As Judge Leopizzi noted: "[n]either the prosecutor, defense counsel nor myself have any independent recollection of the total number of potential jurors individually questioned, nor the number of black potential jurors interviewed." *Statement Settling and Certifying the Record of Proceedings of the Honorable Bruno L. Leopizzi*, J.S.C., October 4, 1988 pp. 5-9. Moreover, while none of the lawyers nor Judge Leopizzi can recollect whether defense counsel objected to the composition of the jury, the notes of Judge Marchese, who presided over certain parts of this case, (although not the jury selection) reflect that the defense moved for a mistrial charging that

the state systematically excluded blacks from the jury. *Id.*[2] Thus, the defense arguably preserved the issue for appeal.

The serious problems identified by petitioner's counsel must be adjudicated by the state courts. The Appellate Division of the Superior Court has presently provided the means by which petitioner may challenge the adequacy of the reconstructed portions of the record. I have every reason to believe that the state will renew its efforts to expeditiously and thoroughly consider all of the issues raised in petitioner's appeal. In the unlikely event that this does not occur, or if any of the conditions of my earlier opinion are not met, a writ of habeas corpus will be available to petitioner through this court.

CONCLUSION

For the foregoing reasons, this court may not, at this juncture, hear petitioner's motion challenging the sufficiency of the reconstructed portions of the record and requesting that the record be deemed inadequate. The motion is therefore denied without prejudice to petitioner's right to raise these issues in the state appellate proceedings and in any future federal habeas corpus petition following exhaustion of state remedies.

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[2]The state's complicity in the unavailability of the record must also be considered when considering the adequacy of the reconstructed record. *See Simmons*, 689 F.Supp. at 448-49.

/s/ Dickinson R. Debevoise, U.S.D.J.

Date: NOV. 14, 1988

APPENDIX J

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1613-87T1
MOTION NO. M-6367-87
BEFORE PART S
JUDGE(S): SHEBELL
ASHBEY

ORDER ON MOTION

STATE OF NEW JERSEY

vs.

LAWRENCE L. SIMMONS

MOTION FILED AUGUST 10, 1988, AUGUST 15, 1988
ANSWER(S) FILED AUGUST 19, 1988
BY: LAWRENCE L. SIMMONS
SUBMITTED TO COURT AUGUST 24, 1988

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 26TH DAY OF AUGUST, 1988, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT STATE OF NEW JERSEY TO PERMIT FILING OF A NOTICE OF APPEAL NUNC PRO TUNC BY APPELLANT LAWRENCE L. SIMMONS, FOR LIMITED REMAND TO RECONSTRUCT THE RECORD, AND FOR FURTHER RELIEF

GRANTED	DENIED	OTHER
x		

SUPPLEMENTAL:

FOR THE COURT:

/s/ THOMAS F. SHEBELL, JR.
P.J.A.D.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Jack G. Trubenback
Clerk of the Appellate Division

FILED
APPELLATE DIVISION
AUG 30 1988

Jack G. Trubenback
Clerk

APPENDIX K

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 86-4274

LAWRENCE L. SIMMONS,
Petitioner,

vs.

HOWARD BEYER, et als.,
Respondents.

ORIGINAL FILED
JUL 5, 1988
WILLIAM T. WALSH, CLERK

Appearances on the papers:

Lawrence L. Simmons, Pro Se
#60462
Trenton State Prison
CN 861
Trenton, NJ 08625

W. Carey Edwards, Esq.
Attorney General of New Jersey
BY: Jane E. Hendry, Esq.
Special Deputy Attorney General
Acting Assistant Prosecutor
Office of the Passaic County Prosecutor
New Courthouse
Paterson, NJ 07505
Attorney for Respondents.

OPINION

DEBEVOISE, District Judge

Lawrence L. Simmons petitioned for a writ of habeas corpus. Petitioner argues that he was deprived of the "right to appeal" by counsel's failure to file an appeal on his behalf. He also alleges that he was denied effective assistance of counsel on appeal:[1]

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[1]The state ignores the obvious Sixth Amendment claim posed by this petition, treating it instead as a case involving merely denial of a "right to appeal." The state notes that it may insist on compliance with procedural rules, in the absence of a showing that failure to comply resulted from ineffective assistance, and insists that "no such showing has been made herein." [Answer at 9.] However, petitioner raised the ineffective assistance issue in connection with his first habeas proceeding, so the state has been aware of this claim since 1980. As for a "showing," there is sufficient material on the record to judge the merits of the ineffective assistance claim. The state does not argue that petitioner has failed to exhaust state remedies. Indeed, the state is in no position to make such an argument. In his letter brief in support of his 1986 *pro se* Superior Court, Appellate Division motion for leave to file a notice of appeal *nunc pro tunc*, petitioner specifically raised his Sixth Amendment claim (at p.4), citing ineffective assistance by his attorney

> "Defendant submits that whenever he wasn't represented by the Public Defender's office, he received assistance from one of the paralegals within the prison. Also, he should not be discriminated against because of what his attorney and Public Defender's office failed to do because he have been trying to secure an appeal ever since his conviction."

Although petitioner has provided only a cursory description of the grounds for his petition for habeas corpus, his entitlement to the writ is clear in light of the procedural nightmares which have to date prevented him from obtaining any appellate review of his convictions for murder, murder while armed, robbery, and conspiracy to commit robbery, which culminated in a sentence of life plus 9-10 years. Petitioner must be granted an opportunity

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and the Public Defenders Office and referring to the Sixth Amendment. See also p. 8 of Brief and Appendix submitted by the Department of the Public Advocate in support of motion to file a notice of appeal *nunc pro tunc.*

Where the state does not raise such a nonexhaustion objection, I am entitled to proceed to the merits. *Reynolds v. Ellingsworth*, 843 F.2d 712 (3rd Cir. 1988) (citing *Granberry v. Greer*, ___ U.S. ___, 107 S.Ct. 1671, 1675 (1987) to effect that where State has not raised nonexhaustion as defense and where there are no "unresolved question[s] of fact or of state law [that] might have an important bearing" on the claims, federal court can reach merits of unexhausted claims). Had the state claimed nonexhaustion, it is hard to conceive a stronger case for the futility exception to the exhaustion requirement.

to obtain the substantive review which he has sought in vain at least from the date of sentencing in December, 1977.

Procedural History:

Petitioner was convicted on November 16, 1977 in the New Jersey Superior Court. He was indigent, and was represented at trial by Adolph Gallucio, who was a "pool" attorney assigned by the Public Defender. Final judgment was entered on December 21, 1977, and petitioner was sentenced on December 2, 1977. At that time he was advised of his right to appeal, and advised his pool attorney that he wished to appeal. However, no notice of appeal was filed within the 45-day limit established by New Jersey law. From March 1978 to January 1980, petitioner exchanged correspondence with trial counsel and the appellate section of the Public Defender in attempts to verify the status of his appeal and/or to commence an appeal. Most of this correspondence, which will be discussed in greater detail later in the opinion, is collected in Exhibit 17.

On March 24, 1980, after numerous attempts to verify the status of or, in the alternative, assure the filing of, a state appeal, petitioner filed for a writ of habeas corpus in federal district court in New Jersey. The court denied the petition for failure to exhaust state remedies, rejecting petitioner's argument that delays in the appellate process excused the exhaustion requirement in his case. The state argued in that proceeding that state remedies were still available to petitioner, in the form of an appeal *nunc pro tunc*, which is in theory available automatically under

New Jersey law for criminal defendants who have "within time" requested that an attorney file an appeal on their behalf. The state continued to argue that state remedies were available as petitioner appealed to the Third Circuit and petitioned for *certiorari* before the United States Supreme Court. (See Exh. 4, Respondent's Brief in Opposition, at 5-6.) On May 21, 1981, the Third Circuit denied petitioner's motion for the provision of pretrial, trial and sentencing transcripts without prejudice to application for such materials in state court. On January 27, 1982, the Third Circuit affirmed the denial of a writ of habeas corpus. On June 7, 1982, the United States Supreme Court denied a petition for *certiorari*.

On July 12, 1982, petitioner filed in the trial court for post conviction relief. On December 10 and 20, 1982, the trial court held evidentiary hearings at which petitioner was represented by Michael Kingman, designated counsel. (This representation ensued after Judge Marchese wrote to the Public Defender's Office on July 15, 1982 that "I would assume that somebody from your office should be assigned to represent the defendant soon so that he can prepare for the hearing date."[2]

Uncontradicted testimony was presented by petitioner and his trial attorney to the effect that petitioner

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[2]It appears that the Public Defender delayed several months in assigning counsel for this matter. At the hearing on post-conviction relief, counsel indicated in the course of a question that he had only been appointed approximately a month before the December 10 hearing. (December 10, 1982 Transcript, at 24.)

had wished all along to appeal and had asked his trial attorney to handle this for him immediately after sentencing. Petitioner testified that he recalled that at sentencing, the trial court "asked Mr. Galuccio as well as myself will a notice of appeal be filed, and Mr. Galluccio and myself said, yeah – Mr. Galluccio stated that he will file a notice of appeal for the Defendant, Lawrence Simmons." (December 10, 1982 Transcript, at 9-10.)[3] Petitioner testified that between conviction and sentencing, and again immediately following sentencing, and again immediately following sentencing, Mr. Galluccio indicated that he would file a notice of appeal. (December 10, 1982 Transcript, at 10.) Petitioner also stated that he had signed some papers at trial counsel's request which were related to an appeal. (*Id.* at 11). Petitioner testified that he continued to believe that an appeal had been filed on his behalf until he received letters dated June 27, 1979 from Ms. Rosemary Burke of the Appellate Division of the Superior Court and August 1, 1979 from the Office of the Public Defender. (*Id.* at 17.) He testified that he remained confused on January 5, 1980, when he wrote to trial counsel asking whether counsel had filed an appeal within time. (*Id.* at 18-19.) He testified that he first became aware that Galluccio had never filed a notice of appeal when he received a letter from Galluccio dated January 18, 1990. (*Id.* at 19-20.)

Petitioner's trial counsel testified at a hearing held ten days after petitioner testified, confirming certain aspects

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[3]Whether this is accurate cannot be determined at this juncture, because the trial and sentencing transcripts were never prepared.

of petitioner's account and disputing others. Galluccio denied that he had agreed to prosecute an appeal for petitioner, but testified that he believed that petitioner had indicated immediately upon sentencing that he wished to appeal; he could not recall whether petitioner had also stated his desire to appeal at the time of conviction. (Exh. 19 at 3.) Although he lacked specific recollections as to what he had advised petitioner, he believed based on his typical practice that he would not have agreed to file the appeal on petitioner's behalf and would have told him that the appeal must be handled by the appellate division of the Public Defender, unless he was appointed to continue in the case. He indicated that his practice was to tell defendants that they had 45 days to appeal. Former counsel made no written memorials concerning this conversation or conversations, and took no steps to inform the Public Defender of petitioner's desire to appeal.

Trial counsel could not remember when petitioner next spoke with him concerning a possible appeal, but said that though written communications began in March 1978, after the 45-day period had expired, he believed that there were one or two phone calls before the letter. He testified that "I believe I received the phone call from him while he was either in the Passaic County Jail or in the state's prison where he indicated that he wanted to appeal, although there's no memorandum to that effect in my file." (Exh. 19 at 8.) Various letters in the record from and to petitioner's trial attorney, the Public Defender Appellate Section, and the Appellate Division, suggest that petitioner originally believed an appeal had been filed, and that when

he found out none had, he was confused about the proper course to follow. See Exh. 17.

Despite communications from the petitioner, his trial attorney, and a prison educational counsellor, Raymond Thompson, the Public Defender never contacted petitioner offering to file an appeal *nunc pro tunc*. In none of the materials on the record does it appear that either petitioner's attorney or the Appellate Section of the Public Defender warned him either of the exhaustion requirement or of the urgency of his predicament. At the December 20, 1982 hearing on post-conviction relief, the state conceded that "[o]bviously Mr. Simmons, being indigent, had the right to be represented on appeal by the public defender's office, and someone in that office did not pursue the appeal in the proper manner." (Exh. 19 at 15.)

At the conclusion of the first state post-conviction relief proceeding, Judge Marchese noted that petitioner was in effect seeking permission to make a belated appeal, which he was without jurisdiction to grant. He signed an order denying relief but making the following factual findings, *inter alia*:

> "3. Defendant immediately after imposition of his sentence expressed a desire to appeal to his attorney, who advised defendant that the Public Defender's Office would handle his appeal; 4. Either because he was misled or confused, defendant believed an appeal had been filed on his behalf by his trial attorney, when in fact no Notice of Appeal has ever

> been filed on defendant's behalf; 5. Defendant has at all times maintained his desire for appeal, as evidenced by his testimony in this matter, and his filing, *pro se*, of a number of Federal pleadings concerning his conviction in this matter; 6. At no time did defendant knowingly or intentionally waive his right to appeal." (Exh. 20.)

The Court recommended that the Appellate Division permit defendant to appeal. This order was dated July 7, 1983.

In August, 1983, petitioner sought relief from the Appellate Division in the form of leave to file a late appeal *nunc pro tunc*. The motion was made on or about August 1, 1983, and filed on August 22, 1983. A Notice of Appeal was submitted on August 17, 1983, by the Public Defender. Judge Marchese's findings concerning petitioner's desire to appeal were presented. The Passaic County Prosecutor responded in a letter of August 22, 1983, neither opposing nor consenting to the request. On September 15, 1983, petitioner submitted an amended notice of appeal. On September 22, 1983, the appeal was docketed and given a number. Five days later, on September 27, 1983, the Appellate Division denied the motion and dismissed the docketed appeal without opinion. The Appellate Division's standard order indicated that the state had filed an answer. However, defendant's counsel stated in an affidavit that he had never been served with an answer, and had been under

the impression that the motion to file a late appeal was unopposed. (Exh. 18, at DA 11-12.)

On October 12, 1983, petitioner's counsel filed a motion for reconsideration or rehearing. He pointed out that under *State v. Altman*, 181 N.J. Super. 539, 438 A.2d 576 (App.Div.1981), the only determination to be made on a motion by an indigent criminal defendant for appeal *nunc pro tunc* is whether the defendant had within time asked counsel to file such an appeal. He also pointed to a Notice to the Appellate Bar relaxing Rule 2:4-4(a), which was published at 100 N..J.L.J. (1977), to the effect that:

> "[t]he Supreme Court has directed the Appellate Division to relax Rule 2:4-4(a) in favor of allowing an out-of-time appeal *nunc pro tunc* on behalf of an indigent criminal defendant in any case where it satisfactorily appears that the defendant personally, within time, requested his trial counsel *or* the Public Defender's Office to file an appeal on his behalf (emphasis added)."

Despite the apparent applicability of this guideline to the petitioner's situation, this motion was denied on October 25, 1983, again without any explanation.

The next appropriate step was to petition to the state Supreme Court for certification. Due to what Kingman, the attorney assigned to the case by the Public Defender's Office, described as "cumbersome procedures" of communication between assigned counsel and the Public

Defender, the petition for certification was filed on November 4, 1983, several days late. (Exh. 5.) Kingman filed a memorandum and affidavit explaining the delay, and requesting an extension of time for filing. In his substantive papers, *see Petition for Certification*, Exh. 18, counsel repeated the state court rule arguments already made, but made no effort to raise any constitutional argument, such as that defendant had been denied effective assistance of counsel or that the denial of an appeal violated due process.[4]

At this point, the state's posture—which had previously been one of neutrality—was reversed. The state responded to the request for an extension of time for the

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[4]Petitioner's counsel had suggested a constitutional dimension in his opening remarks at the December 10, 1982 hearing on post-conviction relief: "What I am seeking, Your Honor, today is, by way of fact finding, under the case of *State v. Allen*, A-L-L-E-N, at 99 N.J. Super. 314, 239 A.2d 675 (Law Div.1968) involving a somewhat similar matter of a defendant who filed a Post-Conviction Relief petition where he alleged, among other things, that he had not been advised of his right of appeal and had been deprived of effective assistance of counsel." Moreover, the first federal habeas action served to place the state on notice of petitioner's constitutional claims, despite the failure to raise them again in briefs on the motion for post-conviction relief in the form of an appeal *nunc pro tunc*. Petitioner's counsel alluded to the Sixth Amendment argument in questioning petitioner during the December 10, 1982 hearing on post-conviction relief: "Q: And was one of the arguments or the claims that you made in that proceeding the fact that you were denied assistance of Counsel in pursuing your appeal in New Jersey? A: Yes, sir. I was denied the right as to Counsel and to appeal the lowest court decision to a higher court. They never assigned me to account for anyone."

filing of the Petition with a letter dated November 18, 1983, reading:

> "The state is in receipt of defendant's motion for extension of time to file Petition for Certification. Defendant fails to indicate the length of time required to file a petition. Also, in view of the age of this matter, the state will not consent to this motion."

(Exh. 16.) "The state sent letters in January 1984 (Exh. 3) and September 1984 (Exh. 6) opposing the petition for certification of the denial of post-conviction relief on the grounds that no colorable issue or demonstration of probable merit had been made. The state also criticized Judge Marchese's factual findings. Counsel did not attempt to set forth grounds for the requested appeal, but rather pointed out that under case law and the Supreme Court Notice directing that appeals *nunc pro tunc* be granted liberally, no indication of issues which would be presented could be required. Counsel indicated that he could not indicate what issues would be raised, since he had neither represented petitioner at trial nor had an opportunity to review the transcript, since none had been prepared.[5]

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[5]The state appears to suggest that failure to comply with N.J. Ct.R. 2:8-1(a), which provides that "[o]n motion for leave to appeal the brief shall include argument on the merits of the issues sought to be appealed" constitutes a procedural default barring habeas review under *Wainwright v. Sykes*. This is not a tenable position, however. There is no indication that the state court's response to the petition was motivated by a desire to enforce the procedural rule. The state court decisions were without opinion, and the January 6, 1984 and September 14, 1984 letters from the Attorney General suggesting that failure to

Seven and a half months later, in June 19, 1984, the state Supreme Court granted petitioner the extension of time which he sought. On November 7, 1984, the court denied the petition for certification, without opinion.

On May 9, 1986, petitioner submitted a *pro se* notice of motion indicating that he "will move before the Superior Court, Appellate Division, in the above titled action, for entry of the following relief with reliance on the attached letter brief and appendix: 'An order allowing defendant to file *nunc pro tunc* Notice of Appeal.'" In a letter dated May 15, 1986, the prosecutor wrote to the clerk of the Appellate Division that "we oppose defendant's *pro se* motion for leave to file a Notice of Appeal *nunc pro tunc*, based upon our understanding of the matter's procedural history. Our records indicate the matter was already been disposed." (Exh. 7.) In a letter dated August 7, 1986, the state submitted opposition papers which noted the disposition of petitioner's previous motion to file an appeal *nunc pro tunc*. On August 12, 1986, the Appellate Division denied petitioner's motion to proceed as an indigent and to file a notice of appeal *nunc pro tunc*.

The instant petition for a writ of habeas corpus was filed in October 1986.

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brief the merits justifies rejection of the proposed appeal do not allude to the rule but instead rely on two largely irrelevant civil cases, *James v. Francesco*, 61 N.J. 480, 295 A.2d 633 (1972) and *Gnapinsky v. Goldin*, 23 N.J. 243, 128 A.2d 697 (1957), both of which *permitted* belated appeals rather than penalizing clients for the errors of their attorneys.

Factual Finding Concerning Request to Appeal

The state argues that petitioner has already had a "full and fair opportunity" to litigate this matter, and that habeas relief should be denied because he has "fail[ed] to carry his burden of demonstrating that (1) the state court hearings were vitally flawed, and (2) the state court findings were not supported by the record." This argument is peculiar and unpersuasive in the context of this case.

The only state court which made a relevant "finding"—the state trial court[6]—found that petitioner had expressed a desire to appeal immediately after sentencing, and never voluntarily and knowingly waived the right to appeal. The courts which rejected petitioner's attempt to appeal *nunc pro tunc*—the Appellate Division and Supreme Court—did not comment on this factual finding; rather, they denied the petition for appeal *nunc pro tunc* without any explanation.

While the failure of the state courts to explain their reasoning makes it difficult to determine whether they doubted the trial court's factual finding, an examination of the state's arguments as to why the Appellate Division and Supreme Court *should* deny petitioner's motion demonstrates that the denial does not necessarily indicate

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[6]The trial court lacked power to order an appeal, but the testimony was developed before Judge Marchese, as in *State v. Allen*, 99 N.J. Super. 314, 239 A.2d 675 (Law Div.1968), where the Law Division made findings that petitioner had been denied due process by counsel's failure to advise him of the right to appeal.

any doubts concerning the factual finding. The state's chief objection to the motion for a belated appeal was that petitioner had failed to show a likelihood of success on the merits, which, as will be discussed below, he was not required to do. Moreover, the state persistently suggested that the Appellate Division had "discretion" as to whether to hear the late appeal. Assistant Prosecutor Mongiarno indicated in his introductory remarks at the December 10, 1982 hearing on post-convictions relief that "it would appear that if the Court were satisfied here a timely request had been made by Mr. Simmons to have his appeal filed, then regardless as to whose fault it was that the appeal was never filed, the hearing herein could, in essence, be ruled for the equivalent or tantamount to the filing of a notice of appeal, *and then, of course, it would be up to the Appellate Division as to whether or not they would wish to entertain an appeal at this time, but I think that it would, in essence, be the burden of the petitioner to show that he did, in fact, make a request for his appeal in a timely fashion (emphasis added)."* (December 10, 1982 Transcript, at 4.) The state in opposing petitioner's motion for certification argued that plaintiff had failed to follow proper procedures and concluded that "[w]hile defendant may have expressed a desire to appeal after his conviction no seasonable application was filed with the Appellate Division. *See, Gnapinsky v. Goldyn*, 23 N.J. 243, 128 A.2d 697 (1957). Under these circumstances it cannot be concluded that the Appellate Division *abused its discretion* in denying relief and dismissing this extremely tardy appeal." (emphasis added). (Exh.6).

Thus, the state court factual finding in this matter *supports* the petitioner's position. Given that there was a full and fair opportunity to litigate that issue, in which the state essentially failed to contest petitioner's account, I may be required to accept the state court factual finding. 28 U.S.C. sec. 2254(d) creates a strong presumption that state court factual findings were correct, which applies when habeas petitioners attempt to challenge such findings. In the instant matter, had the state court concluded after its hearing that petitioner had not indicated within time his right to appeal, that finding would have been entitled to deference. *See, e.g., Norris v. Wainwright*, 588 F.2d 130 (5th Cir.), *cert. denied*, 444 U.S. 846, 100 S.Ct. 93, 62 L.Ed.2d 60 (1979) (deferring to state court fact finding that counsel suggested that petitioner appeal but petitioner had refused). Given that the state trial court reached the opposite conclusion after seeing and hearing the witnesses, it would be inequitable and unreasonable to hold that the state is not bound by that finding. The general concerns of comity with state counts apply here, even if the literal terms of sec. 2254(d) do not. *United States ex rel. Patrick v. Russell*, 353 F.Supp. 1269 (E.D.Pa.), *aff'd*, 485 F.2d 683 (3rd Cir.1973), *cert. denied*, 414 U.S. 1145, 94 S.Ct. 898, 39 L.Ed.2d 100 (1974) (relationship between state and federal judiciaries is one of mutual respect, and although at certain times it becomes necessary for a federal court to consider and pass upon matters which are primarily within the sphere of the state courts, particularly in the habeas corpus area, these occasions should be limited by extreme necessity).

Even if am not required to accept the instant state court factual findings, the evidence introduced shows that

petitioner expressed a desire to appeal and failed to do so because he was either confused or misinformed about the proper course to take. The state's suggestion in its September 14, 1984 letter [Exh. 6] that "[t]he record ... fails to support defendant's claim that he properly requested an appeal within time as he was instructed by his counsel and the court at the time of his conviction" is unelaborated and without merit. It appears to be based on two untenable assumptions: that only written correspondence "counts" as evidence, and that any tension between the lawyer's testimony and the client's establishes that the client is lying.

The state trial court heard and evaluated evidence not only from petitioner himself but from trial counsel. He was in a far better position in 1982 to reconstruct the nature of the communications breakdown which apparently occurred than I would be were I to hold an evidentiary hearing in 1988. He was unable to reach a definitive conclusion on what trial counsel had or had not said,[7] but found that petitioner had been either "confused or misled" into thinking his appeal was being taken care of. He did reach clear conclusions on the key issues, namely that petitioner did express a desire to appeal within time and

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[7]Contrary to the view suggested by the prosecution letter of September 14, 1984 opposing the petition for an appeal *nunc pro tunc*, it is not the rule in evidentiary proceedings involving convicted persons challenging the adequacy of counsel that all conflicts in testimony must be resolved in favor of counsel's account. Here, the trial judge heard both accounts, and did not reach the conclusion that counsel had so clearly explained the proper procedure that petitioner's failure to pursue constitutes a deliberate circumvention of proper appellate procedures.

never knowingly waived the right to appeal. I will respect that factual finding.

Petitioner's Constitutional Claim

The record compels but one conclusion: that petitioner has been deprived of his due process rights and of his Sixth Amendment right to effective assistance of counsel.

The state notes correctly that courts have recognized no intrinsic constitutional right to appeal a criminal conviction. However, doctrinal development has not stopped with this truism. Rather, courts have recognized that states have created appeals as of right and that such appeals are a crucial stage in criminal proceedings. In *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956), the Supreme Court held that due process and equal protection require that indigent and equal protection require that indigent defendants be provided with a trial transcript to assist in the preparation of appeals. Justice Black observed that:

> "In criminal trials a State can no more discriminate on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. [It] is true that a State is not required by the federal constitution to provide appellate courts or a right to

> appellate review at all. [But] that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty....
>
> All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial portion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.... There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

This principle was subsequently extended to appointment of counsel on the first appeal as of right for indigent defendants in *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). In *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), the Supreme Court held that the right to assistance of counsel on appeal encompasses a right to effective assistance.

There can be no doubt that the appeal petitioner sought was one of right. New Jersey's Constitution guarantees an appeal as of right to the Appellate Division from the Law and Chancery Divisions of the Superior Court. N.J. Const. Art. 6, sec. 5, para. 2. See *State v. Fletcher*, 174 N.J. Super. 609, 614, 417 A.2d 106 (App.Div.1980); *Midler v. Heinowitz*, 10 N.J. 123, 89 A.2d 458 (1952). Sentencing also "shall" be subject to review by an appellate court. N.J.S.A. 2C:44-7. An examination of the facts of this case, as found by the only state court to analyze them on the record, leaves little doubt that petitioner's access to the appellate procedure was fundamentally undermined by ineffective assistance on the part of trial counsel and the Public Defender service.

Immediately after sentencing, petitioner was abandoned by appointed trial counsel, apparently because counsel's arrangement with the state precluded further payment for services. Trial counsel did not file a notice of appeal. He made no active effort to put petitioner in contact with persons who could assist in his appeal. Rather, he referred an indigent client who had just been sentenced to life imprisonment to a large bureaucracy, apparently providing no name or phone number. Even after receiving clear indications by at least one phone call and more than one letter that petitioner had not filed an appeal, although he wished to, counsel sent a perfunctory letter to petitioner which conveyed no sense of urgency and no concrete guidance as to whom he should turn or what he should do. Counsel did not inform petitioner that he had already missed an important deadline.

No written record has been supplied to me of counsel's withdrawal from the case, and the only court to have taken testimony on the matter found that petitioner had not understood that trial counsel intended to withdraw. Although counsel appears to have lacked specific recollection of these events, he reported that he explained to defendant that he would be unable to represent him unless he were appointed to do so. There is no indication that he promptly advised petitioner that he had not been so designated.

This conduct must be examined in light of the relevant professional responsibility standards. The Supreme Court has found ABA-promulgated professional standards highly relevant in fixing the dimensions of "effective assistance of counsel." In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court held that:

> "More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."

The Third Circuit has also applied this approach. *See In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 160 (D.N.J. 1984), *cert. denied sub nom. Cochrane & Bresnahan v. Plaintiff Class Representatives*, 472 U.S. 1008, 105 S.Ct. 2702, 86 L.Ed.2d 718 (1985) (*citing Strickland v. Washington* for proposition that "[w]e believe that the appropriate guidance for finding the current national standards of ethical norms lies in the standards promulgated by the American Bar Association.")

By the current standards, which were adopted in August 1978, petitioner's counsel was ineffective. The relevant standards are contained in *ABA Standards, Criminal Appeals: Transition from Trial Court to Appellate Court sec. 2.2* (1970); *The Defense Function After Conviction secs. 8.2, 8.3* (1971). *Criminal Appeals Standard* 21-2.2 (approved August, 1978) is entitled "Trial counsel's duties with regard to appeal," and provides that:

> "(a) Counsel, whether retained or appointed to represent a defendant during trial court proceedings, should continue to represent a sentenced defendant until a decision has been made whether to appeal and, if an appeal is instituted, to serve the defendant at least until new counsel is substituted, unless the appellate court permits counsel to withdraw at an earlier time. (b) Defense counsel should advise a defendant on the meaning of the court's judgment, or defendant's right to appeal, on the possible grounds for appeal, and of the probable outcome of appealing.

> Counsel should also advise of any posttrial proceedings that might be pursued before or concurrent with an appeal. While counsel should do what is needed to inform and advise defendant, the decision whether to appeal, like the decision whether to plead guilty, must be the defendant's own choice."

The Commentary notes that:

> "[r]egardless of whether trial counsel will also represent the defendant on appeal, there is the continuing responsibility of trial counsel to provide assistance to a client beyond entry of final judgment in the trial court. This is a critical stage in a criminal prosecution, and no defendant should lack legal counsel during this period."

The Commentary explains that "[t]his standard, in stressing the continuing responsibility of the trial attorney, seeks to avoid the problem of a hiatus in legal representation during a critical period."

Even before those standards went into effect in August, 1978, counsel were required to take active steps to protect the interests of clients whom they would not be representing on appeal. In New Jersey, the Supreme Court had undertaken to protect a defendant's right to appeal after sentencing in R.R. 1:12-9(c), which provided that "[t]he representation of the defendant by counsel so assigned shall continue through trial, and in the event of a

conviction, shall continue through sentencing and shall include advising the defendant with respect to his right to appeal *and if he desires to appeal, the preparation and filing of the notice of appeal and of an application for the assignment of counsel on appeal* (emphasis added)." In *State v. Allen*, 99 N.J. Super. 314, 239 A.2d 675 (Law Div. 1968), the court recognized the "clearly developed judicial awareness of the need for adequate representation for criminal defendants immediately after trial," 99 N.J. Super. at 318, 239 A.2d 675, and held that a defendant who is not advised of right to appeal and right to counsel to prosecute an appeal is deprived of right to effective assistance of trial counsel, even if counsel studied the trial record and determined there were no appealable grounds.

Counsel who wish to withdraw from representation after trial must take active measures to protect their clients' right to appeal. *Cf. Houston v. State*, 263 Ark. 607, 566 S.W.2d 403 (1978) (finding no ineffective assistance where lawyer who had been paid small part of trial fee and nothing for appeal advised petitioner of right to appeal and possibility of consulting prison attorney, informed petitioner's mother of right to appointed counsel, and wrote to petitioner, enclosing notice to appeal and motion to appeal *in forma pauperis* and explaining time limits); *Henry v. Hopper*, 235 Ga. 196, 219 S.E.2d 119 (1975) (finding no ineffective assistance by counsel who testified that he had informed petitioner of appellate rights and counsel's inability to continue representing him, that petitioner indicated that family and friends were seeking other counsel for appeal, and that counsel had petitioner sign pauper's affidavit which would be used only if

petitioner contacted him to say that he was unable to obtain other attorney). In contrast to those cases, petitioner's trial counsel took no measures to protect his client's interest, either by placing him in contact with specific individuals who could assist him with an appeal or by taking the simple procedural steps necessary to protect the right to appeal.

Nor was the conduct of the Public Defender's Office, upon which New Jersey relies to meet its constitutional obligations under *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) and *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), more impressive. The State may not evade its obligations to provide indigent defendants which effective assistance of counsel on appeal by creating and then taking advantage of a gap in representation between the time of sentencing and the time an appeal is filed.

Petitioner wrote in March 1978 and May 1979 (Exh. 17) to the Public Defender asking about the status of his appeal; there is no record of any response until August 1, 1979. The record contains no indication that anyone at the Public Defender's Office made any effort to inform petitioner that he should pursue state remedies *pro se*, or to assist him in seeking leave to file a late appeal prior to the Supreme Court's final rejection of his first petition for a writ of habeas corpus.

An August 1, 1979, 4-line letter from the office of the Public Defender's Appellate Section read:

> This will acknowledge receipt of your letter. We have no record of your appeal. By copy of this letter we are asking Mr. Galluccio to contact us and perhaps we can file out of time. We will keep you informed.

There is no indication that anyone in the Public Defender's Office ever picked up a telephone to speak with petitioner or with trial counsel concerning this matter.

Petitioner's March 1980 filing of a federal habeas petition apparently spurred the Public Defender to write directly for the first time to the pool attorney who had represented petitioner at trial. A letter dated April 16, 1980, from James Smith, Deputy Public Defender, to trial counsel Galluccio, read:

> I have been advised by the Passaic County Prosecutor's Office that Lawrence Simmons has filed a petition for *habeas corpus* claiming that he was denied his right to appeal in the New Jersey courts. Our office has no record of ever being requested to file an appeal in Mr. Simmons' behalf. I am advised that you represented Mr. Simmons as a pool attorney, designated by our Paterson trial office. If this is the case, will you please advise me whether Mr. Simmons had ever indicated that he wished to appeal his conviction for murder. If he did request that an appeal be filed within a reasonable time, I would be willing to file a motion for leave to appeal

> *nunc pro tunc* if he still desires. Any information you can give me on this subject would be appreciated.

(Exh. 21, at 12A.) There is no indication that a copy of this letter was sent to petitioner. Trial counsel replied promptly that defendant had "several times" indicated a desire to appeal, though he did not specify the time at which such requests were made, and wrote that in his opinion "there are substantial issues for appeal." (Exh. 21, at 13A.) The record does not contain any indication that the Public Defender followed up on this communication in any way.

The Public Defender's Office apparently did not take any active role in this matter until July 1982, when Judge Marchese asked the office to provide representation for petitioner in connection with his petition for post-conviction relief, which was filed after his first federal habeas action had run its full course through the Supreme Court. (Exh. 17, at DA 20.).

Both trial counsel and the Public Defender, which was charged with selecting and supervising trial counsel and arranging appellate representation, handled this case in an extremely desultory fashion. Numerous requests by petitioner prompted occasional correspondence, but no action to ensure that petitioner's rights would be protected.

In any event, petitioner's claim can be resolved without determining who was at fault in the breakdown of legal representation. Some states clearly fix responsibility

for protecting an indigent defendant's interests in the critical transition from trial to appeal. *See, e.g., Williams v. United States*, 402 F.2d 548, 551 (8th Cir. 1968) (court rule "squarely places the obligation on court-appointed counsel to advise his client of the right to appeal and to file upon request a timely notice of appeal, and provides such counsel will continue to represent the defendant unless and until relieved by the court"). The Delaware Supreme Court set forth general standards in *Erb v. State*, 332 A.2d 137 (1974), based upon its finding of "appalling and unnecessary delay in prosecution of the appeals resulting from a lack of coordination between trial counsel and the Public Defender and the failure of both of them to meet their responsibilities as counsel of record." The court noted that "[t]rial counsel did not order a transcript of testimony nor provide the Public Defender with pertinent information as to errors of law on which the appeals are based, and the Public Defender did not meet his responsibility to prosecute the appeals with diligence." *Id.* at 139.

New Jersey rules do not appear to specify who shall fill this transition function for indictable offenses; they merely prescribe that the Public Defender is responsible for representation both at trial and on appeal. R. 3:27-1. (The commentary to the old version of Rule 3:27-1, in Del Deo, 1A *N.J. Practice Court Rules Annotated* indicates that "(c)ounsel assigned pursuant to this rule, serve through direct appeal and such post-conviction proceedings or appeals as would warrant assignment of counsel.") Interestingly, for nonindictable offenses the responsibility for arranging a transition is more clearly specified, and is placed with trial counsel, who must file a notice of appeal,

and who is responsible for prosecuting the appeal if he or she fails to file with the notice of appeal an application for assignment of counsel on appeal. R. 3:27-2.

Wherever the fault lies, it is clear that, as the state conceded at oral argument in the hearing on post-conviction relief, the state's system for providing representation to indigent did not work properly in this case. Where systems of public defense break down in this manner, the rights to effective assistance of counsel and to due process are violated. *See, e.g., Cf. Cleaver v. Bordenkircher*, 634 F.2d 1010 (6th Cir. 1980), *cert. denied sub nom. Sowders v. Cleaver*, 451 U.S. 1008, 101 S.Ct. 2345, 68 L.Ed.2d 861 (1981) (state constitutional right to appeal "cannot be regarded as having been vindicated by the appointment of a public defender who is so overloaded with work as to be unable to service his appeal as of right"); *Harris v. Kuhlman*, 601 F. Supp. 987 (E.D.N.Y. 1985) (Weinstein, J.) (state's failure to screen, administer, and monitor appointed attorneys infringed petitioner's due process and equal protection rights); *In re Parizo*, 137 Vt. 365, 404 A.2d 114 (1979) (in case involving both appointed and retained counsel, court remanding for hearing on question of ineffectiveness in that neither lawyer, each apparently proceeding on the basis that the other was to file the necessary notice of appeal, filed the requisite notice in time to preserve review); *Gaines v. Manson*, 194 Conn. 510, 481 A.2d 1084, 1094 (1984) (delay in appeals resulting from overworked and understaffed Public Defender's Office constituted violation of Fourteenth Amendment); *Blankenship v. Commonwealth*, 554 S.W.2d 898 (Ky.App.1977) (appellant denied effective assistance of

counsel where record on appeal was not perfected because of misunderstanding between appointed trial attorney and public defender's office).

Other courts have recognized that defective procedures could violate due process, but have found inadequate showing that they did so in the particular case at hand. *Cf. Siers v. Ryan*, 773 F.2d 37 (3d Cir. 1985) ("zone defense" procedures not so defective as to deprive petitioner of effective assistance of counsel, in absence of showing of any specific instances of ineffectiveness by counsel who represented him); *Greenfield v. Gunn*, 556 F.2d 935 (9th Cir.), *cert. denied*, 434 U.S. 928, 98 S.Ct. 413, 54 L.Ed.2d 288 (1977) (while "horizontal representation" may be inevitable result of constraints on public defender's office, unless each attorney ensures that all who participate are well-informed, "there is some danger that the defendant may be deprived of effective legal assistance").

Here, petitioner has not merely exposed a breakdown in the process for handling the transition from trial to appellate representation, but has shown that he was the direct victim of the procedural defect. Thus, even if trial counsel was not obliged to do more to protect petitioner's right to appeal, the deprivation of representation as a result of the systems or lack thereof of the Public Defender's Office is equally cognizable as a violation of the Sixth Amendment right to effective assistance of counsel. *Cf. Boyd v. Mintz*, 631 F.2d 247 (3d Cir.1980) (when public defender's late entry and consequent late filing of suppression motion resulted in failure to consider motion, there was breakdown in state system such

that Fourth Amendment claim could be litigated in habeas action despite *Stone v. Powell*).

In summary, the denial of effective assistance cannot be excused by confusion over whose responsibility it was to comply with petitioner's request that an appeal be brought. Here, petitioner essentially "fell through the cracks" of the system of New Jersey has established to represent indigent in criminal matters. His access to counsel has been fundamentally shaped by his poverty: the counsel assigned to represent him at trial considered his responsibility to have been discharged at a point at which a private attorney would have remained clearly obligated under the Code of Professional Responsibility to continue representation or take active steps to ensure that petitioner would obtain new retained or appointed counsel. The Public Defender's Office failed to oversee the attorney to whom it had delegated representation, and failed to inquire into the wishes of the petitioner, who had just been sentenced to life imprisonment. After the 45-day period had expired, but during the period when a *nunc pro tunc* appeal would have been granted routinely, the office took no energetic steps to secure such an appeal. Petitioner's inability to escape from this pattern of lackadaisical representation was the result of his poverty. Accordingly, his due process rights have been violated.

Numerous courts have held that where defendants had expressed a desire to appeal within prescribed time limits but, because of attorney's failure to comply with necessary procedures, failed to do so, the rights to due process and effective assistance of counsel have been denied.

See, e.g., Doyle v. United States, 721 F.2d 1195, 1198 (9th Cir.1983) ("[w]hether to take an appeal is a fundamental decision that lies with the defendant," and where counsel's failure to file opening brief resulted in dismissal of appeal, defendant was entitled to have sentence vacated in order that appeal could be perfected); *Gilbert v. Sowders*, 646 F.2d 1146, 1150 (6th Cir. 1981) (it is well settled in circuit that trial counsel's failure to perfect an appeal or to perform procedural duties necessary to prosecute appeal denies due process); *Cantrell v. State of Alabama*, 546 F.2d 652 (5th Cir.), *cert. denied*, 431 U.S. 959, 97 S.Ct. 2687, 53 L.Ed.2d 278 (1977) (failure by counsel to perfect appeal is denial of effective assistance); *Macon v. Lash*, 458 F.2d 942, 950 (7th Cir.1972) (petitioner who had evidenced desire to appeal within time was entitled to order discharging him from custody unless appeal on merits was provided within a reasonable period); *Williams v. United States*, 402 F.2d 548, 552 (8th Cir. 1968) (period between sentencing and expiration of time for appeal is critical stage of criminal proceeding and right to counsel covers such period); *Wainwright v. Simpson*, 360 F.2d 307 (5th Cir.1966) (failure by counsel to commence simple steps for appeal blatantly denies due process). Thus, petitioner has shown ineffective assistance of counsel.

"Prejudice" from Denial of Due Process and Effective Assistance of Counsel

The state seeks to prevent issuance of a writ of habeas corpus, and to avoid any substantive review of petitioner's conviction, by claiming that petitioner's assertion of a right to appeal is inadequate because he has

not pointed to specific grounds for appeal.[8] There are several problems with this argument. First, it is factually incorrect. In the first federal habeas action, petitioner pointed to several grounds for appeal, namely claims that the verdict was against the weight of the evidence, that he was unfairly prejudiced by pretrial publicity, and that there were improprieties in jury deliberations. Thus, petitioner has in fact suggested grounds on which he intends to seek appellate relief.[9]

The more important point is, however, that petitioner has been denied an opportunity to develop possible grounds for appeal. No one has even been able to read the transcript from his trial, which may now be lost permanently. Petitioner has long sought assistance by counsel in probing the trial record and determining meritorious grounds for constitutional challenge of his conviction. This habeas action must be viewed as preliminary to an exploration of the merits of the case.

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[8]The erroneous view that petitioner is required to make such a showing in order to obtain an appeal has apparently been a factor in the state's conduct throughout this case. In a letter of January 6, 1984, opposing petitioner's request for certification of the denial of post-conviction relief to the Supreme Court, the Attorney General noted that no colorable issue or demonstration of probable merit was tendered in petitioner's motion papers.

[9]More recently, petitioner has submitted recantations from the prosecution's key witness in support of his claim that he was innocent. While this may not be relevant to his appeal, it could be the subject of an action to set aside the judgment of conviction.

This result is dictated by relevant authority. Recognizing that the lack of examination by competent counsel of the trial transcript makes it impossible to know what if any grounds for appeal would have been promising, courts presume prejudice rather than insisting on a specific showing thereof. *See, e.g., Rodriguez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969) (defendant deprived of right to appeal by trial counsel's failure to file notice of appeal not required to specify errors that he would have raised on appeal or demonstrate that denial of appeal was prejudicial in order to state a prima facie case warranting post-conviction relief); *United States v. Mosiman*, 604 F.Supp. 1003 (E.D. Wisc.1985) ("In supporting a claim of ineffective assistance of appellate counsel, the defendant is not required to specify the points that he would raise on appeal or to argue the likelihood of success on the merits."); *Robinson v. Wyrick*, 635 F.2d 757 (8th Cir.1981) (where counsel's failure to file proper brief resulted in finding that none of points argued had been properly preserved, petitioner was denied effective assistance of counsel, and petitioner would not be required to show that appeal was meritorious); *Grooms v. Solem*, 520 F.Supp. 1184, 1186 (D.S.D.1981), *aff'd without opinion*, 685 F.2d 436 (8th Cir.1982) (trial court's belief that to obtain relief from violation of right to appeal petitioner must specify trial errors was erroneous); *Riser v. Craven*, 501 F.2d 381 (9th Cir.1974) (allegation that counsel failed to file appeal or tell petitioner how to do so on own behalf deprived him of effective assistance of counsel, and no showing of prejudice was required).

While the Supreme Court has not addressed precisely this issue, it has indicated that in certain circumstances prejudice is to be assumed. *See United States v. Cronic*, 466 U.S. 648, 659 n. 25, 104 S.Ct. 2039, 2047 n. 25, 80 L.Ed.2d 657 (1984) (certain types of state interference with counsel's assistance legally presumed to result in prejudice); *Cuyler v. Sullivan*, 446 U.S. 335, 345-50, 100 S.Ct. 1708, 1716-19, 64 L.Ed.2d 333 (prejudice presumed when counsel is burdened by actual conflict of interest which adversely affected lawyer's performance). In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court explained that an important feature of the interference situation is that "[p]rejudice is so likely that case by case inquiry into prejudice is not worth the cost," *id.* at 692, 104 S.Ct. at 2067, while in the conflict situation, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests."

Both these characteristics are present here. Failure to pursue an appeal is extremely likely to be prejudicial. However, the existence of prejudice is extremely hard to prove in the absence of review by a capable advocate of the record at trial. Thus, I find that petitioner is not required to demonstrate additional probable prejudice flowing from his failure to take an appeal.

Affirmative Defense: Procedural Default

The state appears to suggest that petitioner has "deliberately bypassed" the state appellate process, in favor of pursuing a litigation strategy centered on federal courts.

In the alternative, the state argues that petitioner is barred from the instant action by procedural defaults in that he failed to perfect his appeal within the prescribed time periods in the state system.

Knowing and voluntary waiver, rather than "cause and prejudice," appears to be the standard for evaluating a decision to forego appeal. In *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), Justice Burger joined in the majority opinion signed by five justices but concurred specially, expressing the view that the *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed2d 837 (1963), voluntary waiver standard had no application to decision which were necessarily made by counsel, and indicating that he would "leave the core holding of *Fay* where it began," and reject its extension to decision which must be made rapidly at trial. 433 U.S. at 92-94, 97 S.Ct. at 2509-10. In *Boyer v. Patton*, 579 F.2d 284 (1978), the Third Circuit, citing Chief Justice Burger's concurrence, held that where defendant was inexperienced and confused as to his right to appointed counsel, he did not waive his constitutional objections by failure to take a direct appeal. In *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), the Court reaffirmed the distinction between failure to prosecute an appeal at all and failure to raise particular promising issues.[10] Thus, *Fay* still appears

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[10]The Court "express[ed] no opinion" as to whether counsel's decision not to take any appeal at all would be subject to the *Fay v. Noia* deliberate bypass standard.

to apply to major strategic decisions which should be made by the defendant personally.

While the state has not suggested any conduct by petitioner indicating a waiver in the sense of a desire to forego appellate review,[11] the state appears to argue that there was a deliberate bypass, in that petitioner chose to pursue legal challenges in federal rather than state court. Given the facts of this case, the state's position is untenable. Petitioner made several efforts to verify the status of his state appeal before realizing that none had been filed. The very aim of the present habeas petition, and of the earlier one, in which petitioner also asserted denial of the right to appeal and denial of effective assistance of counsel on appeal, has been to *secure* an appeal in the state system. Petitioner has not attempted to use habeas proceedings as an alternative to direct appeal, but rather has consistently attempted to obtain access to state appellate procedures.

Moreover, the very decision by petitioner to proceed in federal court is itself the product of the state's failure to

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[11]The state did suggest in its January 6, 1984 opposition to the petitioner's first request for an appeal *nunc pro tunc* that "it does not appear" that defendant "contacted his counsel to request an appeal" within the requisite time period. The state pointed out that the first letters on the record were in March, 1978. However, trial counsel testified that he believed that petitioner had indicated his desire to appeal at the time of sentencing, if not before, and that he believed that there might have been subsequent telephone conversations before the 45-day period had expired. The state simply ignores the trial judge's finding based on that evidence that petitioner did express a desire to appeal within time and did not waive the right to appeal.

provide adequate representation in the crucial post-conviction period. Given the federal habeas statute's exhaustion requirement and the development of that doctrine in case law by the late 1970's, it was plain that attempts to obtain review in federal court without prior efforts to exhaust state remedies would normally be futile. Had petitioner received competent legal advice, he would have been so informed. While choosing the forum in which to proceed, however, petitioner was not represented.[12]

By the time that petitioner was in contact with a lawyer, his case was already on appeal to the Third Circuit.[13] The Third Circuit apparently found the claim that exhaustion was excused by state delays sufficiently colorable to issue a certificate of probable cause permitting petitioner to appeal the denial of the writ of habeas corpus by the district court. *Cf. Booker v. Kelly*, 636 F.Supp. 319 (W.D.N.Y.1986), *aff'd without opinion*, 833 F.2d 1002 (2d

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[12]The only indication on the record as to why petitioner sought federal habeas rather than attempting to proceed *pro se* in state court is that he indicates that a prison paralegal suggested this approach.

[13]At the hearing on post-conviction relief, petitioner's counsel asked "between the time you were represented by Mr. Galluccio in 1977 and the time approximately a month ago when I was appointed to represent you, in between those approximately five years, was there any attorney appointed to represent you?" He responded "[n]o, sir. I was never assigned counsel." (December 10, 1982 Transcript at 24.) On cross-examination, he conceded that the Third Circuit had appointed counsel who filed a motion for him. (*Id.* at 29).

Cir. 1986) (delay in appeal not equivalent of complete absence of effective state appellate process so as to excuse failure to exhaust state remedies, absent attempt by petitioner to obtain *coram nobis* relief in state court, but petitioner was entitled to certificate of probable cause to permit appeal on exhaustion question). The counsel appointed to assist petitioner in the federal case found it worthwhile to petition for *certiorari* to the United States Supreme Court. Thus, petitioner's initial decision to proceed in federal rather than state court stemmed from lack of proper representation, and his decision to stay in federal court was on advice of counsel. Under the circumstances, I find no deliberate bypass, and believe that petitioner should not be penalized for his belief that exhaustion could be excused under the circumstances.[14]

Petitioner's response to the state courts' denial of his motion for a belated appeal is inconsistent with any notion

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[14]The state argues that petitioner was put on notice as to how he should proceed by its answering papers in response to his initial petition in federal district court for a writ of habeas corpus. This contention that convicted persons should accept and follow the legal "advice" of prosecutors is, to put it mildly, novel and unpersuasive. New Jersey had a responsibility to provide effective legal representation to petitioner in connection with his first appeal as of right; when the persons so charged failed petitioner, the state cannot argue that he had "notice" of the proper procedure by virtue of the prosecution's litigation posture. (The prosecutor's suggestion that petitioner should have followed their advise is rather ironic here, given that while it was the essence of the state's claim that petitioner continued to have access to meaningful state remedies, the prosecutor took an at best uncooperative, at worst obstructive, stance once petitioner did return to state courts.)

that he maneuvered to obtain federal as opposed to state adjudication of his claims. Rather than returning to federal court immediately once it became possible to do so, petitioner filed another motion in state court for an appeal *nunc pro tunc*, which was opposed by the state and was denied. Thus, I find the theory that petitioner knowingly and voluntarily "by-passed" state courts in preference for a federal forum to be without merit.

The claim that petitioner is barred by procedural defaults from obtaining appellate review is little more tenable. Even if the applicable standard for reviewing petitioner's failure to file a timely appeal is no longer *Fay's* knowing and voluntary waiver standards but the much more stringent standard set forth in recent cases involving procedural defaults, petitioner must prevail. Under the standards set forth by the Supreme Court in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed2d 594 (1976), a habeas petitioner who has failed to comply with state procedural rules must show cause for that failure to comply and prejudice stemming therefrom. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court clarified that where counsel's actions caused the procedural default, relief will only be available if the behavior resulting in default constituted ineffective assistance under the rigorous standards of *Wainwright v. Strickland*. Since the failure of either assigned counsel or the Public Defender to file an appeal within time or to file for an appeal *nunc pro tunc* more promptly constituted ineffective assistance, and since prejudice may be presumed under the circumstances, petitioner is entitled to relief.

Character of Relief

Where an appeal has been denied in violation of due process and Sixth Amendment rights, the normal remedy is to order the state to make available an appeal *nunc pro tunc*. *See, e.g., Macon v. Lash*, 458 F.2d 942 (7th Cir. 1972) (finding that where petitioner had evidenced desire to appeal before time had expired, but no appeal was had, appropriate relief is preparation of transcript, appointment of counsel, and appeal in state system, and noting that "[i]ronically, the desire to minimize expenses by saving the cost of preparing trial transcripts has no doubt resulted in post-conviction litigation expenses far greater than the cost of the appeal itself" and that "[i]n any event, the requirements of evenhanded procedures are clear"); *Joseph v. White*, 404 F.2d 322 (5th Cir.1968); *Bosler v. Swenson*, 363 F.2d 154 (8th Cir. 1966), *aff'd per curiam*, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967); *Garton v. U.S. ex rel. Kumitis v. Rundle*, 244 F.Supp. 894 (E.D.Pa.1965); *Spaulding v. Taylor*, 234 F.Supp. 747 (D.Kan.1964).

Here, however, it is not clear whether an appeal at this late date will be feasible. The state has indicated that the materials necessary to prepare complete transcripts in this matter have been lost.[15] I have been informed by the

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[15]There is some question about what has happened. Lucille Olive of Open Gate Connection, who has been assisting the petitioner, spoke with a staffer at the court reporter's office in Passaic County who indicated that transcripts could be purchased for $4.00 a page, and said nothing about these transcripts being missing. See Olive Letter of November 23, 1987. The report that these transcripts cannot be created was contained in a letter of October 2, 1987, from the Passaic

Court Reporter in Passaic County that these materials were most likely lost in the summer of 1985, when asbestos removal generated chaos in storage facilities. Petitioner tried at least six years before that to obtain copies of the transcripts. In a letter dated May 14, 1979, petitioner wrote to Joel Harris at the office of the Public Defender, stating that:

> I am concerned in that I have not heard any word from this office regarding my trial transcripts, or an attorney being designated to represent me on appeal. Won't you kindly check your files and advise me 1) the date of a Notice of Appeal was filed and the docket number assigned; 2) whether the complete trial transcripts have been received and if so I hereby request that a copy be made and sent to me prior to designating an attorney ...

(Exh. 17, at DA 4.)

An order was signed by Judge Meanor on March 28, 1980, at the outset of the original habeas action, directing respondents to file an answer to the petition on or before April 25, 1980, "accompanied by a certified copy of all briefs, appendices, opinions, process, pleadings, transcripts, and order filed in the state proceedings or such of them as may be material to the questions raised in this petition."

County prosecutor.

While the transcripts were arguably unnecessary in the first action, which was dismissed for failure to exhaust state remedies, this order and the pendency of the action itself put the state on notice that transcripts were likely eventually to be required. In 1981, the Third Circuit denied a motion for preparation of transcripts without prejudice to efforts to obtain these through the state court system. At that point, petitioner was being assisted by counsel appointed to assist him with the appeal to the Third Circuit, who apparently took no action to obtain the transcripts by motion in state court. The petitioner asserted as a final ground of error in his petition for *certiorari* before the Supreme Court that he had not been provided with transcripts. The state noted in response that a similar application to the Court of Appeals had been denied, and "relie[d] upon the arguments previously presented in reiterating its contention that petitioner's remedy, is a state court appeal not foreclosed even at this late date, during which proceeding petitioner may make application for the transcripts." (Exh. 4, Respondent's Brief in Opposition, at 10.)

In 1983, the Public Defender again began to represent petitioner in connection with the attempt to secure an appeal *nunc pro tunc*. The Public Defender ordered copies of the transcript of the hearing on the motion for post-conviction relief, see amended notice of appeal certifying that in compliance with Rule 2:5-3(a), counsel had ordered copies, but did not order the entire

trail and sentencing transcripts.[16] A representation was made in the brief to the Appellate Division in support of the motion to appeal *nunc pro tunc* to the effect that "efforts are now underway to acquire transcripts of the trial." [Exh. 21 at 8 n. 2.] However, it does not appear that transcripts were ordered or prepared.

Meanwhile, rather than preparing the transcripts or even taking steps to preserve the tapes and other materials necessary to do so, the state apparently delayed until the necessary materials were destroyed. Accordingly, the normal remedy for violation of the right to appeal — permitting appellate counsel to seek error in trial transcripts — may prove impossible here. The petitioner may not be forced to undertake an appeal without transcripts or some substitute form of record adequate to prosecute that appeal. *Bundy v. Wilson*, 815 F.2d 125 (1st Cir.1987); *Oliver v. Zimmerman*, 720 F.2d 766 (3d Cir.1983), *cert. denied*, 465 U.S. 1033, 104 S.Ct. 1302, 79 L.Ed.2d 701 (1984). *Cf. Byrd v. Wainwright*, 722 F.2d 716 (11th Cir.), *cert. denied*, 469 U.S. 869, 105 S.Ct. 217, 83 L.Ed.2d 147 (1984) (criminal defendant has constitutional right to transcript in order to petition state supreme court for discretionary review). If the grounds for an appeal indicate "a colorable claim for a

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[16]This decision by the Public Defender not to order transcripts until a motion for appeal was granted does not, contrary to the suggestion in the state's letter of January 6, 1984, constitute any sort of waiver. Transcripts would have had to be paid for out of the Public Defender's budget. The decision on whether to order transcripts was not up to petitioner, and accordingly he cannot be penalized for failure to do so.

complete transcript, the burden is on the State to show that only a portion of the transcript or an alternative will suffice for an effective appeal on those grounds." *Mayer v. City of Chicago*, 404 U.S. 189, 195, 92 S.Ct. 410, 415, 30 L.Ed.2d 372 (1971); *see also Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963).

Since it is conceivable that the state may yet be able to find or reconstruct an adequate record to permit an appeal, I will give it an opportunity to do so, as directed by the Third Circuit in *U.S. ex rel. Cleveland v. Warden, N.J. State Prison*, 544 F.2d 1200 (1968), a case involving a trial 25 years before in which transcripts had never been prepared and the court reporters' notes had been destroyed.

In the event that a new trial is required, it is, of course, likely that the state's case will be severely prejudiced. The state's main, perhaps only, witness has recanted. However, the costs of this delay must be imposed on the state, not the petitioner. *Cf. Harris v. Kuhlman*, 601 F.Supp. 987 (E.D.N.Y.1985) (Weinstein, J.) (where court-appointed counsel had failed to perfect an appeal within seven and a half years, failure was ineffective assistance for which the state must be held responsible for purposes of application of the exhaustion requirement).

Conclusion

I will grant a conditional writ of habeas corpus, giving the state an opportunity to cure the due process violation either by giving petitioner an effective appeal to

the appellate courts or a new trial. If one of these conditions cannot be met, the writ must issue.

APPENDIX L

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1262-85T4
MOTION NO. M-4841-85
BEFORE PART D
JUDGE: MICHELS

STATE OF NEW JERSEY

vs.

LAWRENCE L. SIMMONS

MOVING PAPERS FILED JUNE 30, 1986
ANSWERING PAPERS FILED AUGUST 7, 1986
DATE SUBMITTED TO COURT AUGUST 6, 1986
DATE ARGUED
DATE DECIDED AUGUST 12, 1986

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION TO
PROCEED AS AN INDIGENT,
NUNC PRO TUNC

GRANTED	DENIED	OTHER
	x	

SUPPLEMENTAL:

FOR THE COURT:

/s/ HERMAN D. MICHELS
P.J.A.D.

WITNESS, THE HONORABLE HERMAN D. MICHELS, PRESIDING JUDGE OF PART D, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 12th DAY OF AUGUST 1986.

/s/ Elizabeth McLaughlin
CLERK OF THE
APPELLATE DIVISION

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Elizabeth McLaughlin
Clerk

FILED
APPELLATE DIVISION

AUG. 13 1986

Elizabeth McLaughlin
Clerk

APPENDIX M

SUPREME COURT OF NEW JERSEY
C-288 SEPTEMBER TERM 1984

21,881

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

LAWRENCE SIMMONS,
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-325-83T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied; and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to *R.* 2:12-9.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 7th day of November, 1984.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

FILED
November 9, 1984
Stephen W. Townsend
Clerk

APPENDIX N

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-325-83T4
MOTION NO. M-486-83
BEFORE PART G
JUDGE: MATTHEWS

PASSAIC COUNTY INDICTMENT NO. 737-77

ORDER ON MOTIONS/PETITIONS

STATE OF NEW JERSEY

vs.

LAWRENCE SIMMONS

MOVING PAPERS FILED OCTOBER 12, 1983
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT OCTOBER 25, 1983
DATE ARGUED
DATE DECIDED OCTOBER 25, 1983

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR
RECONSIDERATION OF M-196-83
(MOTION TO FILE NOTICE
OF APPEAL
NUNC PRO TUNC)

GRANTED	DENIED	OTHER
	xx	

SUPPLEMENTAL:

FOR THE COURT:

/s/ ROBERT A. MATTHEWS
P.J.A.D.

WITNESS, THE HONORABLE ROBERT A. MATTHEWS, PRESIDING JUDGE OF PART G, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 25th DAY OF OCTOBER 1983.

/s/ Elizabeth McLaughlin
CLERK OF THE
APPELLATE DIVISION

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Elizabeth McLaughlin
Clerk

FILED
APPELLATE DIVISION
Oct 25 1983

Elizabeth McLaughlin
Clerk

APPENDIX O

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-325-83T4
MOTION NO. M-196-83
BEFORE PART G
JUDGE: MATTHEWS

PASSAIC COUNTY INDICTMENT NO. 737-77

ORDER ON MOTIONS/PETITIONS

STATE OF NEW JERSEY

vs.

LAWRENCE SIMMONS

MOVING PAPERS FILED AUGUST 22, 1983
ANSWERING PAPERS FILED AUGUST 22, 1983
DATE SUBMITTED TO COURT SEPTEMBER 23, 1983
DATE ARGUED
DATE DECIDED SEPTEMBER 27, 1983

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION TO
FILE NOTICE
OF APPEAL
NUNC PRO TUNC

GRANTED	DENIED	OTHER
	xx	xx

SUPPLEMENTAL:

The above-captioned appeal is hereby dismissed.

FOR THE COURT:

/s/ ROBERT A. MATTHEWS
P.J.A.D.

WITNESS, THE HONORABLE ROBERT A. MATTHEWS, PRESIDING JUDGE OF PART G, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 27th DAY OF SEPTEMBER 1983.

/s/ Elizabeth McLaughlin
CLERK OF THE
APPELLATE DIVISION

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Elizabeth McLaughlin
Clerk

FILED
APPELLATE DIVISION
Sep 27 1983

Elizabeth McLaughlin
Clerk

APPENDIX P

MICHAEL L. KINGMAN, ESQUIRE
Nine Atlantic Street
Hackensack, N.J. 07601
(201) 488-0571
Attorney for Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY
INDICTMENT NO. 737-77
Criminal Action

ORDER

STATE OF NEW JERSEY,
Plaintiff,

vs.

LARRY SIMMONS,
Defendant.

ORIGINAL RETAINED FOR THE
PASSAIC COUNTY CLERK'S OFFICE

This matter having been opened to the Court upon the filing of a Petition for Post-Conviction Relief by defendant on July 12, 1982, and Michael L. Kingman, Esq., having been appointed to represent defendant on this matter, and Bruno Mongiardo, Esq., Passaic County Assistant Prosecutor having appeared on behalf of the State,

and the Court having heard testimony on December 10 and December 20, 1982, and having considered the moving and supplemental pleadings, exhibits, and briefs filed and arguments heard with regard to this matter, the Court makes the following findings of fact and conclusions of law:

1. Defendant is presently serving a sentence in the aggregate of life plus 10 years imposed in December of 1977;

2. Subsequent to defendant's conviction, defendant was advised of his right to appeal by both the court and his attorney at that time, Adolph Galluccio, Esq., a pool attorney appointed by the Public Defender.

3. Defendant immediately after imposition of his sentence expressed a desire to appeal to his attorney, who advised defendant that the Public Defender's Office would handle his appeal;

4. Either because he was mislead of confused, defendant believed an appeal had been filed on his behalf by his trial attorney, when in fact no Notice of Appeal has ever been filed on defendant's behalf;

5. Defendant has at all times maintained his desire for appeal, as evidenced by his testimony in this matter, and his filing, *pro se*, of a number of Federal pleadings concerning his conviction in this matter;

6. At no time did defendant knowingly or intentionally waive his right to appeal;

7. This Court is without the power or jurisdiction to grant defendant's Petition for Post-Conviction Relief, which essentially seeks an appeal for his conviction, and for that reason defendant's Petition for Post-Conviction Relief is denied; however, it is the recommendation of this court that defendant be permitted, based upon the foregoing findings of fact, to file and pursue an appeal with the Appellate Division of the Superior Court of this State.

/s/ William J. Marchese, J.S.C.

FILED
July 7, 1983

APPENDIX Q

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 7, 1982

Mr. Joseph A. Falcone
Passaic County Prosecutor
Courthouse
Patterson, NJ 07505

Re: Larry Simmons,
v. Gary J. Hilton, Superintendent, Trenton State Prison, et al.
No. 81-6560

Dear Mr. Falcone:

The Court today entered the following order in the above entitled case:

The petition for writ of certiorari is denied.

Very truly yours,

/s/ Alexander L. Stevas, Clerk

APPENDIX R

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-2489

LAWRENCE L. SIMMONS,
Appellant,

v.

GARY J. HILTON, Superintendent of Trenton State Prison, THE ATTORNEY GENERAL of the State of New Jersey, STANLEY C. VAN NESS, Public Advocate

(Civil No. 80-00843 - D.N.J. - Newark)

Submitted Under Third Circuit Rule 12(6)
January 22, 1982

BEFORE: SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, two-wit, that (1) appellant's right to due process under the 14th amendment of the United States Constitution was violated by the inexcusable, unjustifiable, unreasonable and inordinate delay in granting access to the New Jersey appellate court system, (2) appellant's right to relief by habeas corpus should not be denied where his failure to appeal was not intentional or a knowing and intelligent waiver of the right, (3) appellant has a right to relief by habeas corpus where time to appeal has passed regardless of the doctrine of exhaustion where at the time of filing of the writ, no state remedies were available, (4) appellant was denied his right to a fair and impartial jury as a result of pretrial publicity and improprieties in the jury deliberations involved in his case, and (5) appellant has been denied his right of due process and equal protection under the 14th amendment by the denial of his motion for a copy of the transcript of his trial and motion for a new trial by the United States Court of Appeals for the Third Circuit, it is

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

By the Court,

/s/ Seitz
Chief Judge

ATTEST: /s/ Sally Mrvos
Clerk

DATED: Jan 27 1982

Certified as a true copy and issued in lieu of
a formal mandate on February 18, 1982.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court
of Appeals for the Third Circuit.

APPENDIX S

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 80-843

UNITED STATES OF AMERICA
ex rel. Lawrence L. Simmons,
Petitioner,

vs.

GARY J. HILTON,
Superintendent, et al,
Respondents.

OPINION

MEANOR, District Judge.

Petitioner Larry Simmons was indicted in Passaic County, New Jersey on charges of first degree murder, conspiracy to commit robbery, being armed (Ind. No. 737-77) and with the crime of robbery (Ind. No. 970-77). A jury trial was held on these charges between October 11, 1977 and November 8, 1977. Petitioner was convicted on all counts. On November 16, 1977 petitioner was sentenced on the charges encompassed within Ind. No. 737-

77. He received a life sentence on the first degree murder conviction, a consecutive nine to ten year term on the conviction for being armed, and a concurrent two to three year term on the conviction for conspiracy to commit robbery. On December 21, 1977 petitioner was sentenced to a term of twelve to fifteen years, concurrent to the previously-imposed term, on the robbery charge in Ind. No. 970-77.

This *pro* se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was filed on March 24, 1980. An answer was filed on behalf of the State of New Jersey on April 25, 1980. In the answer, dismissal of this application is sought on the basis of petitioner's failure to exhaust state remedies. On May 12, 1980 petitioner filed a supplemental brief in response to the answer of the State of New Jersey.

From the exhibits annexed to the petition and supplemental brief, the following information may be gleaned. Petitioner was represented at his trial by Adolph J. Gallucio, Esq. who was appointed counsel. In September 1978 petitioner directed a letter to Gallucio in which he inquired as to "who [was] going to handle [his] appeal" in the event Gallucio was not so assigned. Exhibit A-11. Gallucio responded on October 11, 1978, informing petitioner "that someone from the appellate section of the Public Defender's Office ... must handle your appeal." Exhibit A-9. Petitioner apparently continued to request information from Gallucio into May 1979. Exhibit A-8. Subsequently, petitioner inquired into the status of his appeal and, on June 27, 1979, was informed that no appeal

on his behalf had been filed in the Superior Court of New Jersey, Appellate Division. Exhibit A-7. By letter of August 1, 1979, James K. Smith, Jr., Deputy Public Defender, informed petitioner that his office had "no record of your appeal." Gallucio was asked to contact Smith's office with an eye toward late filing of an appeal. Exhibit A-6. By letter dated January 5, 1980 petitioner again inquired of Gallucio as to whether a notice of appeal had been filed. Exhibit A-5. Gallucio responded on January 18, 1980, advising petitioner that he "did not file a notice of appeal." Gallucio further advised that his "appointment as your assigned counsel terminates" at sentencing and that he was "not permitted to continue ... unless, specifically re-assigned by the Public Defender." Exhibit A-4. On January 23, 1980 petitioner again corresponded with Gallucio and alluded to representation that had been made concerning Gallucio's filing of a notice of appeal. Exhibit A-3. On January 29, 1980 an education counselor employed by Trenton State Prison corresponded with Smith, informed him of the alleged misunderstanding on the part of petitioner as to the appeal and inquired into the intentions of the Public Defender's office with regard to the filing of an appeal. Exhibit A-2. On February 11, 1980 Gallucio responded to the January 23 letter and repeated that the Public Defender's office should be contacted "to assist you in prosecuting an appeal." Exhibit A-1. Apparently, an inquiry had been made by Smith to Gallucio. In response, Gallucio informed Smith on April 25, 1980 that petitioner had asked him to file an appeal "on several occasions" and that petitioner had been "advised ... that the Appellate Section of the Public Defendant's Office would have to prosecute the appeal."

Mr. Gallucio also added his "recollection ... that there are substantial issues for appeal." Exhibit A-16. As noted above, this application had been filed on March 24, 1980.

On this application petitioner contends: (1) That New Jersey has denied petitioner the right to appeal his conviction; (2) That he has been denied effective assistance of counsel on appeal; (3) That there has been an inordinate delay in the processing of his appeal, thereby absolving petitioner of the exhaustion requirement of 28 U.S.C. § 2254 and, (4) That petitioner was denied a fair trial due to prejudicial publicity concerning his case.

28 U.S.C. § 2254 provides, in pertinent part,

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the court of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the

> law of the State to raise, by an available procedure, the question presented.

The exhaustion doctrine is a rule of comity designed to permit a state the initial opportunity to consider and correct violations of the Federal Constitution. *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Codispoti v. Howard*, 589 F.2d 135 (3d Cir. 1978). In the present case, the state courts of New Jersey have had no opportunity whatsoever to pass upon the alleged deprivation of petitioner's constitutional rights. No direct appeal has been taken. No application has been made for permission to file an appeal out of time. The circumstances summarized above concerning petitioner's appeal have never been brought to the attention of the New Jersey courts in the context of an application for permission to file an appeal out of time.

Additionally, there has been no resort to post-conviction remedies afforded by Rule 3:21 *et seq.* of the New Jersey Court Rules. *See State v. Allen*, 99 N.J. Super. 314 (Law Div. 1968) (alleged deprivation of right to appeal and to assistance of counsel on appeal entertained pursuant to post-conviction proceedings). Although a petitioner for a writ of habeas corpus is not required to exhaust state post-conviction remedies in circumstances in which constitutional claims have been raised on direct appeal, *Brown v. Allen*, 344 U.S. 443 (1953); *United States ex rel. Geisler v. Walters*, 510 F.2d 887 (3d Cir. 1975), § 2254 requires resort to such remedies where, as here, no direct appeal has been taken. *Tyler v. Swenson*, 527 F.2d 876, 880 (8th Cir.), *cert. denied*, 425 U.S. 915 (1976). *See Humphrey v. Cady*, 405 U.S. 504, 516 & n. 18 (1972); *United States ex*

rel. Carbone v. Manson, 447 F. Supp. 611, 618 & n. 2 (D. Conn. 1978).

Petitioner relies upon a series of cases holding, in essence, that inordinate delay in state corrective process creates an exception to the exhaustion requirement of § 2254. *See e.g. Codispoti v. Howard, supra; United States ex rel. Geisler v. Walters, supra; United States ex rel. Senk v. Brierley*, 471 F.2d 657 (3d Cir. 1973). I find these cases to be inapposite to the present situation. The delay in presenting an appeal of petitioner's conviction is not attributable in any way to the New Jersey courts. There has been no appeal filed for the Superior Court, Appellate Division to act upon. Furthermore, none of the documents provided by petitioner indicate that the state prosecutor in any way hindered petitioner in seeking redress from the appellate courts of New Jersey. To apply the rationale of the above cases to the present situation would require state appellate courts to "reach-out" and decide cases in which relief has not been sought by the parties. Such is not the law.

I conclude that petitioner has failed to exhaust his state remedies as required by 28 U.S.C. § 2254. The petition for a writ of habeas corpus will, therefore, be dismissed. No probable cause for appeal exists. The court will enter its own order.

DATED: May 23, 1980.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 6 1995
OFFICE OF THE CLERK

No. 94-1857

In The

SUPREME COURT OF THE UNITED STATES,

October Term, 1994

HOWARD L. BEYER, Superintendent, and
W. CARY EDWARDS, Attorney General of New Jersey,

Petitioners,

v.

LAWRENCE L. SIMMONS,

Respondent.

MOTION FOR LEAVE FOR RESPONDENT LAWRENCE L. SIMMONS TO PROCEED IN FORMA PAUPERIS

Respondent Lawrence L. Simmons, through his attorney, John Vincent Saykanic, Esq., hereby moves for leave to proceed in forma pauperis. Mr. Saykanic was appointed under the Criminal Justice Act (18 U.S.C. Sec. 3006A(d)(6)) by the Honorable Dickinson R. Debevoise, U.S.D.J. and by the Third Circuit Court of Appeals. Mr. Simmons proceeded in forma pauperis in both the district court and in the court of appeals. Mr. Simmons is still indigent.

Dated: June 6, 1995

JOHN VINCENT SAYKANIC
Counsel for Respondent
Lawrence L. Simmons

No. 94-1857

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HOWARD L. BEYER, Superintendent, and
W. CARY EDWARDS, Attorney General of New Jersey,

Petitioners,

v.

LAWRENCE L. SIMMONS,

Respondent.

On Petition for Writ of Certioriari to the
United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN VINCENT SAYKANIC
1135 CLIFTON AVENUE
CLIFTON, NEW JERSEY 07013
(201) 779-1124
(201) 472-5863
Attorney for Respondent
Lawrence L. Simmons

June 6, 1995

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Third Circuit's decision extends the retroactivity rule beyond the limits of, and in conflict with, decisions of this court and announces a new rule?

2. Whether the Third Circuit's decision rejecting the state appellate court's decision under state substantive and procedural law conflicts with decisions of this Court?

3. Whether the Third Circuit's decision held that a Batson prima facie showing does not have to be borne by a defendant, and whether important and unresolved problems are raised?

4. Whether the petition for writ of certiorari must be denied since the Third Circuit reached its decision on an issue not even raised in the petitioners' petition?

LIST OF PARTIES

All parties are parties to this petition.

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NO. 94-1857

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HOWARD L. BEYER, Superintendent, and
W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

vs.

LAWRENCE L. SIMMONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Lawrence L. Simmons, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Howard L. Beyer and W. Cary Edwards.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 44 F.3d 1160 (3d Cir. 1995). The Third Circuit's opinion is reproduced in the Appendix to the petitioners' petition for Writ of Certiroari at p. 1a.

The order of the United States Court of Appeals for the Third Circuit is reported at 44 F.3d 1176 (3d Cir. 1995), and is reproduced in the petitioners' Appendix at p. 37a.

The opinion of the United States District Court, District of New Jersey, is reported at 796 F.Supp. 777 (D.N.J. 1992), and is reproduced in the petitioners' Appendix at p. 47a.

The opinion of the Superior Court of New Jersey, Appellate Division, has not been reported and is reproduced in the petitioners' Appendix at p. 92a.

The opinion of the United States District Court, District of New Jersey, is reported at 689 F.Supp. 432 (D.N.J. 1988), and is reproduced in the Petitioners' Appendix at p. 175a.

JURISDICTION

On January 4, 1995, the United States Court of Appeals for the Third Circuit filed its opinion and entered its judgment reversing the district court's denial of a writ of habeas corpus. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1254(1).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, SEC. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE*

Respondent Lawrence L. Simmons ("respondent") wishes to point out to this Court that, although not stated in the petitioners' petition for writ of certiorari, there was virtually no evidence presented at the Simmons trial linking respondent to the murder of David Doktor, except for the testimony of David Wilson. Respondent emphasizes to this Court that, assuming arguendo the petitioners' facts are accepted, it was Donald Phillips, and not respondent, who struck Doktor in the head with the pipe, causing Doktor's death.

In Simmons, there was no physical or scientific evidence implicating respondent. No fingerprints linking him to the scene of the crime were found. No blood was found on his clothing or shoes. No witness for the State could identify respondent as being one of the perpetrators, save for David Wilson, the State's star witness.

At the Simmons trial, David Wilson testified that on the night of the murder he had been with Donald Phillips and respondent (who he just met that night) and the three decided to steal a car. (6T36-12 to 37-17). According to Wilson, on the way to steal the car the three observed Doktor descending the stairs of a house. According to Wilson's trial testimony, Phillips tapped respondent on the shoulder and said "let's get him." (6T50-22 to 55-4).

---

* Pursuant to Rule 15.1, respondent points out perceived misstatements of fact and law in the petitioners' petition.

Wilson testified that respondent punched Doktor in the face, and Phillips proceeded to also punch Doktor in the face. (6T55-21 to 57-4). Doktor then "made a noise" and swung at Phillips, and Phillips punched his arm, breaking his wristwatch. Phillips (and not respondent) then removed plastic from his back pocket, wrapped it around his hands and then retrieve the pipe which he had secreted in a car and struck Doktor in the head a number of times. (6T57-5 to 25). Respondent allegedly removed Doktor's wallet from his back pocket, and the three ran. (6T59-3 to 61-9).

As Wilson testified at trial, it was Phillips, and not respondent, who struck Doktor in the head with the pipe, causing his death.

The entire State's case rested on the testimony of David Wilson, and he was given immunity in July of 1977 for the homicide of Doktor and the mugging of George Marshall. (6T75-8 to 76-5). At trial, Wilson at first refused to answer any questions on the grounds that it might incriminate him, and the trial judge entered an order compelling him to testify. (6T25-14 to 20; 6T29-8 to 19).

At trial, Wilson actually admitted that he would do anything to get a better deal for himself, and, if it suited his purpose to lie, he would lie. (7T38-10 to 25). While waiting to testify in the trial, Wilson claimed he had received a threatening note warning him not to testify for the State. After months of claiming he had received this note from one of the defendants at trial, Wilson admitted that he had actually written

the note to himself, in order to get a better deal. (7T33-11 to 38-13).

This is the witness upon which the Passaic County Prosecutor's Office based its entire murder case against respondent. As noted above, there was no other evidence linking respondent to the Doktor murder. At the new trial motion made on April 4, 1989, Bruno Mongiardo, the Assistant Prosecutor who tried the Simmons case, testified that in his opinion the government's case could not have even been submitted to a jury without David Wilson's testimony. (24T219-24 to 220-8).

Respondent testified at trial in his own defense and denied any involvement in the murder of Doktor, though he had admitted seeing Phillips and Wilson earlier that evening as respondent's sister, Wanda Addison, lived beneath Donald Phillips' mother's upstairs apartment. (10T11-22 to 23; 10T27-15 to 20; 10T30-13 to 15). Respondent was walking from his sister's house to his mother's house when the police questioned and arrested him. (10T19-11 to 14; 10T18-12 to 23-10). Respondent has to this day maintained his innocence in the Doktor murder.

Following the respondent's conviction and imprisonment, David Wilson recanted his trial testimony and testified under oath that he had lied when he had implicated respondent in the Doktor murder. Wilson testified at the recantation hearing that he had no knowledge concerning the death of David Doktor and that he had testified falsely because he had been told to lie by the Paterson Police Officers involved in the case, and he was afraid

of going to jail for life for the murder charge (for which he had been arrested). (23T55-20 to 56-25; 23T59-3 to 7). Wilson recanted his trial testimony because he had given his life to God and this is part of his confession, and he "could not live with it no more." (23T76-16 to 23).

While David Wilson had every reason to lie at the Simmons trial--his fear of being prosecuted for the Doktor murder (23T44-16 to 45-12; 23T55-20 to 56-25; 23T59-3 to 7), Wilson had every reason not to lie at the recantation hearing--namely, a possible perjury charge. (23T85-24 to 86-23).

At the recantation hearing, Bruno Mongiardo (who had tried the case for the State of New Jersey), testified that the "local police were lazy and were not completely open and forthright with me as to what they did on the investigation." (24T191-3 to 8).

In spite of this, respondent's new trial motions were denied and his convictions from 1977 stood until the Third Circuit Court of Appeals granted the writ in January of 1995.

Concerning the procedural history of this case, respondent points out that he had already petitioned this Court for certiorari in 1991, and this Court denied the petition for writ of certiorari (Lawrence Simmons v. New Jersey, No. 90-6999). (89a). Accordingly, this Court has already declined to address the issues in the case sub judice.

Respondent notes that the mandate in his case has been stayed by the Third Circuit until this petition is decided. (45a). Accordingly, respondent has not been permitted to have the

bail motion (which he filed immediately after the Third Circuit's decision in January of 1995) heard in state court due to a lack of jurisdiction. Accordingly, respondent at this time remains in prison without an opportunity for bail in spite of the fact that his conviction has been ruled unconstitutional.

ARGUMENT

REASONS FOR DENYING THE WRIT

A. THE THIRD CIRCUIT DECISION DOES NOT EXTEND THE RETROACTIVITY RULE BEYOND THE LIMITS OF, AND IN CONFLICT WITH, DECISIONS OF THIS COURT AND DOES NOT ANNOUNCE A NEW RULE CONTRARY TO TEAGUE V. LANE

Petitioners claim that the court of appeals "has manufactured a new rule of retroactivity involving state appeals granted nunc pro tunc on federal collateral review." (Pb at p. 17).

Petitioners claim that "The criminal judgment in this case was final on February 6, 1985 for purposes of retroactivity analysis, as respondent had exhausted his state appellate remedies and the time for filing the petition had expired." (Pb 18). This claim by the petitioners is completely wrong, for respondent did not have his direct appeal decided by the New Jersey Superior Court, Appellate Division (the first appeal of his conviction) until July of 1990. (92a). The New Jersey Supreme Court then denied the petition for certification in October of 1990. (90A). This Court denied the petition for writ of certiorari on April 1, 1991. (89A).

Accordingly, since the respondent's direct appeal was not heard in state court until 1990, and the United States Supreme Court did not deny certiorari until 1991, the petitioners' claim that the criminal judgment was final in February of 1985 defies explanation. Even the Third Circuit in its decision concluded "Here, Simmons' 1977 conviction did not become final until 1991

when the United States Supreme Court denied his petition for a writ of certiorari. See Allen, 478 U.S. at 258 n. 1, 106 S.Ct. at 2880 n. 1 (citation omitted)." (6a).

As the Third circuit concluded:

> Although this case was before the Supreme Court in 1982, in conjunction with Simmons' efforts to get a direct appeal, it did not then become final in the relevant sense. Simmons' first appeal as of right was the critical missing step, and his intervening applications for collateral review did not render his conviction final. See Caspari v. Bohlen, __ U.S. __. 114 S.Ct. 948, 953 (1994). Accordingly, the Batson decision, announced in 1986, applies to this case." (6a).

In Allen v. Hardy, supra, this Court held that the decisions in Batson should not be applied retroactively on collateral review of convictions that became final before the opinion was announced. This Court, in footnote one, explained that "final" means that the judgment of conviction was rendered, the availability of appeal exhausted, and the time for the petition for certiorari had elapsed before the decision was in. Allen v. Hardy, supra, 106 S.Ct. at 2880.

In Caspari v. Bohlen, __ U.S. __, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994), this Court held that in applying the Teague non-retroactivity rule to determine whether a habeas petitioner is seeking to benefit from a new rule of constitutional law, the court must first ascertain the date on which the petitioner's state court conviction and sentence became final. It must then survey the legal landscape as it existed at the time of the petitioner's conviction to determine whether the state court

considering petitioner's claim at that time would have felt compelled by existing precedent to conclude that relief was constitutionally required.

In Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), this Court held that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.

The Third Circuit properly analyzed the case sub judice under this Court's decisions in Allen, Caspari, and Griffith (6a), and correctly concluded that the Batson decision applied to the Simmons case. Contrary to the claim of the petitioners, there is no "new rule of retroactivity" being applied by the Third Circuit in this case. Indeed, the Third Circuit's decision comports precisely with this Court's decisions in Allen, Caspari, and Griffith, and the decision certainly does not announce a new rule contrary to Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Contrary to petitioners' claim, this Third Circuit's determination will not result in "confusion and inqeuitable (sic) results." (Pb at p. 22). The Third Circuit, after a period of 15 months from the date of oral argument, wrote a thoughtful and well-reasoned opinion correctly based upon this Court's decisions. Accordingly, petitioners' writ should be denied.

B. THE THIRD CIRCUIT'S DECISION REJECTING THE STATE APPELLATE COURT'S DECISION UNDER STATE SUBSTANTIVE AND PROCEDURAL LAW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

The petitioners claim "From the State appellate court opinion, (App. H,) it seems clear that that court made a factual determination that a timely objection to the prosecutor's use of peremptory challenges was not made in this case. A federal court must afford such written findings of fact by a state appellate court a presumption of correctness." (Pb at p. 23).

Respondent disagrees with this interpretation by the petitioners, and points out that the petitioners do not give a citation to this claim. In any event, the Third Circuit correctly analyzed this issue in its opinion:

> Although the notes of the judge who presided over the voir dire, Judge Leopizzi, do not refer to a defense motion based on systematic exclusion, the file of the judge who presided over the trial and sentencing, Judge Marchese, includes the following notation: "Defense motion for mistrial charging State with systematically excluding blacks from jury. Leopizzi denied." The court clerk's records indicate that defense counsel made several motions for a mistrial before the jury was sworn, although they do not specify the grounds for these motions. Based on this record, we are satisfied that Simmons' Batson claim was preserved for appeal. (12a).

Petitioners' contention that the "respondent's failure to timely object precludes consideration of his Batson claim" (Pb at p. 24) is clearly misguided.

The Third Circuit, in addressing this issue, correctly stated "dismissing a state constitutional claim on state law

grounds does not preclude federal habeas review of a parallel federal constitutional claim." (11a). The Third Circuit cited this Court's decision in Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991) (this case is not cited in petitioners' petition). Coleman stated that this Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal questions and adequate to support the judgment. Id. at 729, 111 S.Ct. at 2553-54.

The Third Circuit, in analyzing the case sub judice under Coleman, found that the Appellate Division's judgment on Simmons' state Gilmore claim was clearly "independent" of his federal Batson claim. (9a). The Third Circuit found that the Gilmore court had explicitly based its decision "on the New Jersey Constitution, which protects fundamental rights independently of the United States Constitution." 511 A.2d at 1157. (9a to 10a).

The Third Circuit concluded, however, that

> The Appellate Division's decision "on the New Jersey Constitution, which protects fundamental rights under Gilmore, however, was not "adequate" to support its judgment. The unavailability of a state constitutional claim is not dispositive as to the availability or merits of an analogous federal constitutional claim ... (10a).

The Third Circuit properly concluded that the dismissal by the state Appellate Division of a state constitutional claim on state law grounds does not preclude federal habeas review of a parallel federal constitutional claim. (10a to 11a). Again, as

with the first issue raised by petitioners, the Third Circuit in a most well-reasoned and correct decision properly applied the cases of this Court. Accordingly, petitioners' writ should be denied.

C. THE THIRD CIRCUIT'S DECISION DID NOT HOLD THAT A BATSON PRIMA FACIE SHOWING DID NOT HAVE TO BE BORNE BY RESPONDENT; AND THE THIRD CIRCUIT'S FINDING OF A PRIMA FACIE SHOWING DOES NOT RAISE "IMPORTANT" OR "UNRESOLVED" PROBLEMS

Contrary to the claims of petitioners, the Third Circuit did hold that it was the respondent Simmons who had the burden of showing a prima facie showing of a Batson violation. As the Third Circuit clearly states in its opinion "Having asserted the claim that the prosecution based its peremptory challenges on race, Simmons had the burden of establishing a prima facie case." (13a). Respondent is at a loss to explain the petitioners' interpretation that the Third Circuit's decision does not require a petitioner to bear the burden of a Batson violation.

Contrary to the petitioners' claim, the Third Circuit clearly does require a petitioner to bear the burden, and correctly finds that the petitioner (respondent Simmons) did meet his burden (see point B, supra).

Contrary to the claims of petitioners, the Third Circuit's decision is not contrary to the principles in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), but in complete conformance. As the Third Circuit concluded:

> Although we cannot evaluate the last two Clemons factors because transcripts of the voir dire are not available, we conclude that Simmons has established a prima facie case of a Batson violation. The combination of Simmons' race, the prosecution's exclusion of at least one potential African American juror, and the circumstances surrounding the crime are sufficient to meet Simmons' prima facie burden. (15a).

It is apparent that the petitioners' contention that this issue "raises important and unresolved problems" is completely erroneous. Accordingly, petitioners' writ should be denied.

D. THE PETITION FOR WRIT OF CERTIORARI MUST BE DENIED SINCE THE THIRD CIRCUIT REACHED ITS DECISION ON AN ISSUE NOT EVEN RAISED IN THE PETITIONERS' PETITION

In the case sub judice, the Third Circuit, in addition to holding that the New Jersey appellate court's decision that Gilmore did not apply retroactively to respondent's case did not bar consideration of the Batson claim, also held that the 13-year delay between the respondent's sentencing and the direct appeal violated respondent's right to due process and a speedy appeal.

The Third Circuit, in finding that "[e]ach Barker factor indicates that the 13-year appellate delay violated Simmons' right to due process and a speedy appeal," (21a) concluded that:

> The 13-year delay in this case is an outrage, and that Simmons' appeal as of right "slipped through the cracks" is shameful. See Burkett I, 826 F.2d at 1225 (five and one-half year delay in sentencing and appeal warranted discharge); cf. Harris, 15 F.3d at 1560 (two-year appellate delay ordinarily gives rise to a presumption of inordinate delay). The subsequent period of litigation marking Simmons' efforts to obtain a direct appeal apparently took on a life of its own, without regard for fundamental notions of fairness and due process. (19a).

As the Third Circuit concluded:

> Having concluded that Simmons is entitled to relief for both his potentially meritorious, but unreviewable, Batson claim and his speedy appeal claim, we consider what relief is appropriate. (22a). (emphasis supplied).

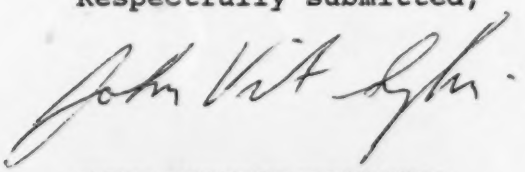
Respondent submits that there is absolutely no merit to the

three issues raised by petitioners in support of the petition for writ of certiorari. However, even assuming arguendo that this Court were to find that one of these three issues is meritorious, the fact remains that the Third Circuit also granted respondent habeas relief on the speedy appeal issue. This speedy appeal issue is not even addressed in petitioners' petition. Respondent submits that the decision of the Third Circuit on this issue is unassailable. Accordingly, the petition for writ of certiorari must be denied.

CONCLUSION

For the foregoing reasons and authorities cited, respondent Lawrence L. Simmons respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,



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June 6, 1995

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Washington, D.C. 20543
Attn: Kathy Tycz

Re: Howard L. Beyer and W. Cary Edwards
v. Lawrence L. Simmons
No. 94-1857

Dear Ms. Tycz:

Enclosed herein please find an original and ten (10) copies of respondent's brief in opposition to petitioners' petition for certiorari in the above-captioned matter, filed on behalf of my client, Lawrence L. Simmons (with motion for leave to proceed in forma pauperis).

Mr. Simmons was appointed appointed under the Criminal Justice ACt and is still indigent.

I certify that on this date I mailed by first-class mail two copies of the respondent's brief to my adversary, Jane E. Hendry, of the Passaic County Prosecutor's Office.

Thank you for your courtesy and cooperation in this matter.

If you have any questions, do not fail to contact this office.

Very truly yours,

John Vincent Saykanic

JVS/ms
Encl.
cc: Jane E. Hendry, Esq.
Lawrence L. Simmons

Supreme Court of the United States

No. 94-1857
Howard L. Beyer, et al.,
Petitioners
v.
Lawrence L. Simmons

ON CONSIDERATION of the motion of respondent Lawrence Simmons to expedite consideration of the petition for certiorari,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, denied.

June 26, 1995